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HARVARD LAW LIBRARY

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

PREPARED AND PUBLISHED IN PURSUANCE OF A STATUTE LAW OF THE STATE.

BY DANIEL CHIPMAN.

VOLUME I.

MIDDLEBURY:

PUBLISHED BY D. CHIPMAN & SON.

J. W. Copeland, *Printer.*

1824.

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1824

DISTRICT OF VERMONT, *to wit:*

BE IT REMEMBERED, that on the seventeenth day of November, in the forty-ninth year of the Independence of the United States of America, DANIEL CHIPMAN, Esquire, of the said District, hath deposited in this office, the title of a book, the right whereof he claims as author and proprietor, in the words following, to wit: "Reports of Cases argued and determined in the Supreme Court of the State of Vermont. Prepared and published in pursuance of a Statute Law of the State. By Daniel Chipman Volume I."

L. S.

In conformity to the Act of the Congress of the United States, entitled "An Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned."

JESSE GOVE,
Clerk of the District of Vermont.

A true copy of record, examined and sealed by me,
J. GOVE, *Clerk.*

SEP 19 1925

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LIST OF JUDGES OF THE SUPREME COURT,

From the year 1778 *to the year* 1824.

Elected October, 1778.
Moses Robinson,
John Shepardson,
John Fassett, jun.
Thomas Chandler,
John Throop.

October, 1779.
Moses Robinson,
John Shepardson,
John Fassett, jun.
John Throop,
Paul Spooner.

October, 1780.
Moses Robinson,
Paul Spooner,
John Fassett, jun.
Increase Moseley,
John Throop.

October, 1781.
Elisha Paynè,
Moses Robinson,
John Fassett, jun.
Bezaleel Woodward,
Joseph Caldwell.

October, 1782.
Moses Robinson,
Paul Spooner,
Jonas Fay,
John Fassett, jun.
Peter Olcutt.

October, 1783.
Moses Robinson,
Paul Spooner,
John Fassett,
Peter Olcutt,
Thomas Porter.

October, 1784.
Paul Spooner,
John Fassett,
Nathaniel Niles,
Thomas Porter,
Peter Olcutt.

October, 1785.
Moses Robinson,
Paul Spooner,
Nathaniel Niles,
John Fassett,
Thomas Porter.

October, 1786.
Moses Robinson,
Paul Spooner,
Nathaniel Niles,
Nathaniel Chipman,
Luke Knowlton.

October, 1787.
Moses Robinson,
Nathaniel Niles,
Paul Spooner.

October, 1788.
MOSES ROBINSON,
Paul Spooner,
Stephen R. Bradley.
Oct. 1789 *and* 1790.
NATHANIEL CHIPMAN,
Noah Smith,
Samuel Knight.
Oct. 1791, 92, *and* 93.
SAMUEL KNIGHT,
Elijah Paine,
Isaac Tichenor.
Oct. 1794 *and* 95.
ISAAC TICHENOR,
Lot Hall,
Enoch Woodbridge.
October, 1796.
NATHANIEL CHIPMAN,
Lot Hall,
Enoch Woodbridge.
October, 1797.
ISRAEL SMITH.
Enoch Woodbridge,
Lot Hall.
Oct. 1798, 99, *and* 1800.
ENOCH WOODBRIDGE,
Lot Hall,
Noah Smith.
October, 1801 *and* 2.
JONATHAN ROBINSON,
Royal Tyler.
Stephen Jacob.
Oct. 1803, 4, 5, *and* 6.
JONATHAN ROBINSON,
Royal Tyler,
Theophilus Harrington.
October, 1807 *and* 8.
ROYAL TYLER,
Theophilus Harrington,
Jonas Galusha.
Oct. 1809, 10, 11, *and* 12.
ROYAL TYLER,
Theophilus Harrington,
David Fay.
October, 1813 *and* 14.
NATHANIEL CHIPMAN,
Daniel Farrand,
Jonathan H. Hubbard.
October, 1815.
ASA ALDIS,
Richard Skinner,
James Fisk.
October, 1816.
RICHARD SKINNER,
James Fisk,
William A. Palmer.
Oct. 1817, 18, 19, *and* 20.
DUDLEY CHASE,
Joel Doolittle,
William Brayton.
October, 1821.
C. P. VAN NESS,
Joel Doolittle,
William Brayton.
October, 1822.
C. P. VAN NESS,
Joel Doolittle,
Charles K. Williams.
October, 1823.
RICHARD SKINNER,
Charles K. Williams,
Asa Aikens.
October, 1824.
RICHARD SKINNER,
Joel Doolittle,
Asa Aikens.

ERRATA.

Page 16, line 3 from bottom, after the word 'heresy,' insert—The Puritans contended that it belonged to the Church to establish Articles of Faith, admitting that it belonged to the civil power to punish heresy.
Page 28, line 9 from bottom, after 'subject,' insert—and subject.
32, top line, for '1813,' read 1814.
32, line 11 from top, for 'member,' read members.
33, line 8 from top, for 'eight,' read seven
46, line 3 from top, after 200*l.* insert—conditioned.
47, line 8 from top at the end insert—to the Sheriff.
52, line 12 from top, for 'defendant,' read plaintiff.
53, line 2 from bottom, for 'indorser,' read endorsee.
55, line 10 from top, for 'endorser,' read endorsee.
81, line 12 from bottom, for 'this,' read his.
201, line *b* in marginal note, for 'a,' read as.
238, line 11 from top, for 'Hawdnis,' read Hawkins.
239, line 15 from bottom, for 'he died,' read the intestate died.
307, line 8 from bottom, between the words 'bar' and 'the,' insert—By.
320, bottom line, for 'preredemption,' read right of redemption.
353, line 5 from bottom, for 'he,' read the.
394, line 18 from top, for 'Salk.' read Salk.
——— 19 from top, for '*ib.*' read *id.*
418, line 13 from top, for 'Coke,' read Croke.
427, line 5 from top, for 'which,' read whom.

PREFACE.

IT is a dictate of patriotism, as well as of piety, to review the state and condition of ourselves, and of our fathers before us, to recount the blessings which have been enjoyed, and the evils which have been suffered, for the great purpose of reformation and amendment.

To induce us to do so, and that we may profit by experience, the same uniform order—the same law of cause and effect, is established in the moral, as in the physical world. But we are so much the creatures of habit, our virtues and our vices being alike habitual, that we seldom enter upon such examination, with a view to the improvement, either of our dispositions or our circumstances.

Besides, experience teaches, that it is unwise to change our course, merely because we have experienced evils in pursuing it, as imperfection is stamped on every thing human. The wise man, therefore, seldom and with caution, leaves the path pointed out by experience, and experiments are generally made by visionaries and wild projectors, and of course, usually fail. Hence a fixed habit is acquired adverse to all attempts at improvement.

This habit, has still more the force of instinct,

in relation to the government, under which we and our fathers have lived, than it has in relation to individual concerns.

The influence of this habit, will be clearly seen, in the following sketch of a history of our jurisprudence, by a careful attention to the causes, which, in the first organization, and administration of the government, have operated to advance, or retard its improvement. Although I can in this place give but a bare sketch, I flatter myself that it may not be wholly destitute of interest, nor entirely useless.

The first settlers of New-England brought with them from the Mother Country, a confirmed habit of viewing the Legislature, in whatever form organized, as absolutely supreme; as moulding and controlling every other department of government, and as subject to the control of no earthly power. Indeed, from the organization of the British Government, under which, they and their fathers had lived, they had been led to consider the omnipotence of Parliament as their only security; to the House of Commons, however, they had been accustomed to look, as their peculiar guardian and protector against the power of the Crown.

These views and these habits are clearly seen in the first organization of the Colonial Governments. But, as they were organized under different circumstances, and in various forms, the different modes of administering those Governments gradually introduced different views, as to the nature, and most fit organization of Civil Govern-

ment. In Connecticut, the Legislature consisted of two branches elected annually by the Freemen, and were vested with Judicial powers.

The people became habituated to look to the Legislature, as possessing the sole inherent and exclusive right of governing and regulating the internal police of the state, as expressed in the 5th Article of our Bill of Rights.

The Legislature of that Colony erected Courts from time to time for the trial of causes, not because they were themselves incompetent to decide them, but because as business increased in the Colony, they could not devote their time to hear them; for they still retained the power of deciding all cases in the last resort. This system continued until long after the organization of Government in this State.

The Judges were appointed annually by the Legislature. But as the Legislature consisted of two Houses, each House acting separately, and each having a negative upon the other, as well in the appointment of Officers, as in acts of Legislation, the Judges held their offices, by a tenure sufficiently permanent, and the Courts were highly respected by the people. Indeed, the first settlers of Connecticut, as well as those of the other Colonies, brought with them from Great Britain, a habit of yielding to the magistrate, not only a high degree of respect, but unreasonable powers. Hence in the administration of justice, in the Colony of Connecticut, the Magistrates exercised the power of discharging a Jury who should refuse to return a verdict accord-

ing to their directions, and of empannelling another to try the cause. Yet at some subsequent period, they vibrated to the other extreme, in permitting the Jury to decide all questions of law as well as of fact. Whether this change was gradual, or was made by a Legislative enactment, or was produced by the sentiments of the people too powerfully expressed to be resisted by the Magistrates, I have not been able to ascertain. It is sufficient for our purpose to know, that for a long period of time before the emigrations to the New-Hampshire Grants commenced, the Judges were not permitted to give their opinion to the Jury in the first instance, even in matters of law, until the Jury had returned a verdict; then, if a majority of the Judges were opposed to the verdict, each Judge charged the Jury in favor of the verdict or against it, agreeably to his individual opinion. The parties seemed to consider that each had a right to the chance of a verdict in his favor. Whence the origin of this, whether it was founded on the same principle in the human character, as that on which was founded the Ordeal of the ancient common law, it is not to our purpose to inquire. Our sole object is to inquire, What were the views and habits of the people of Connecticut in relation to Government, especially, in relation to the Judiciary department?

For many years before the Revolutionary War, the people of Massachusetts had lived under a Royal Government; they had the privilege of electing their Representatives annually, who composed

the popular branch of the Legislature with very limited powers. The people of that Province, by unremitted conflicts between the Executive and their Representatives, during a long period of misrule, imbibed a deep-rooted prejudice against the Executive and the Judiciary. They were habituated to look to their Representatives in the House of Assembly, as their only guardians and protectors against arbitrary power. They were naturally led to believe, that could they have the privilege of electing all the officers of Government, annually, they should be in a state of perfect security and happiness. Happily, however, for the people of that Province, there was a redeeming spirit in the patriotism and political science of John Adams and other patriots of that day, who for the public good, dared to breast and correct popular prejudices; and who, for the purpose of gaining a temporary popularity, could never be induced, by their individual influence, to add a force to a deleterious popular current. Conscious that the dignity of their characters required no official support, they never thought of deserting the lasting good of the people, for the sake of an office, basely acquired at the expense of the public welfare.—Friendship in politics was not with them an article of barter, nor office a subject of bargain and sale. By such men these prejudices were overcome, in the formation of their State Constitution. But their influence could not reach those who had previously emigrated to the New-Hampshire Grants. They, still intoxicated with the enjoyment of the right of

suffrage, relied on that solely for the enjoyment and security of their civil rights.

The people of Connecticut, we have seen, had enjoyed the right of suffrage, in the annual election of all the officers of Government; and in their then simple state of society, and under a peculiar and controlling influence, they enjoyed a high degree of happiness, and a vast majority of the people became strongly attached to that form of government. A small minority, consisting of the minor sects and denominations of Christians, who were treated as dissenters, alone had reason to complain; and, suffering what they at least considered as persecution, did loudly complain. But they believed the persecution which they suffered, arose wholly from the intolerant spirit of the Executive, the Governor and Council, who were elected by a general ticket, and of course represented the prevailing sect, in all their prejudice and spirit of intolerance.

These people struggled long with all the zeal, with all the perseverance, and all the obstinacy of a persecuted sect, but they struggled in vain. Their influence was indeed sometimes felt in the House of Representatives, but, as the Governor and Council had a negative upon that body, their case became hopeless, and they naturally looked to the New-Hampshire Grants as a safe retreat from religious persecution. There were therefore among the emigrants a far greater proportion of the minor sects, than of the prevailing sect. Indeed, two entire societies of Separates, one from Con-

necticut and one from Massachusetts, emigrated to the New-Hampshire Grants, for the purpose of enjoying religious freedom. These societies uniting together, brought their minister with them, and made a settlement, more important, and more flourishing, than any other in the territory. Among these settlers were the Robinsons, Deweys, Fays, Walbridges, and others, who had an influence and principal agency in establishing the title under New-Hampshire, and finally achieving the independence of the State. For some years, the scattered settlers in other parts of the territory looked to Bennington for counsel and protection; and it is not too much to say, that the persecution of these people, causing them to make this settlement, and producing in them a strong attachment to the cause of civil and religious liberty, with an unconquerable determination to maintain them, was among the principal causes of establishing the independence of Vermont. What has not the Christian religion done for the spread and maintenance of civil liberty!

These people could never conceive that any power in legislation could be vested in a Governor and Council consistently with the enjoyment of their civil and religious rights. With the idea of a body thus constituted, they associated the ideas of aristocracy and intolerance. Under other circumstances, with the idea of a body similarly organized, but powerless, they would associate the idea of timidity—a want of firmness and independence.

The settlers on the New-Hampshire Grants in the year 1778, who had achieved their independence and formed a constitution of government, were principally from Massachusetts and Connecticut, but very considerable numbers were from the Colony of Rhode-Island; among whom were some of the most influential men in the formation of the Constitution and administration of the Government.

To the first planters of that Colony we are to look for those views of government, and those habits, which the people of that Colony acquired, so peculiar to themselves.

When the Puritans fled from persecution in England, and planted themselves in America for the purpose of enjoying religious freedom, it was evidently the freedom of the church collectively which they sought—not liberty of conscience to individuals, but the liberty of the church to exercise, without restraint, all that power over the consciences of individuals, which they considered indispensible to preserve the purity of the church.—They were no more averse to a religious establishment, or the punishment of heresy, than those of the established church in England. The great point of difference between them was this:—those of the established church contended, that it belonged to the King as the head of the church to establish articles of faith, and to the civil power to punish heresy. Neither the one nor the other, could conceive that the purity of the church could be preserved, if the laity were left each one for himself

to form his own crude notions in relation to the great doctrines of the gospel. Both agreed that articles of faith must be established, and that an unity of faith could be preserved only by the punishment of heresy. The charge of inconsistency therefore in the first planters of Massachusetts, in fleeing from persecution in England, and becoming persecutors in America, is utterly destitute of foundation. They came to America for the great purpose of planting and preserving a pure church; and history informs us with what zeal and perseverance they immediately entered upon the good work. Banishment was one of the milder punishments inflicted upon obstinate hereticks. The banished heretićks fled to Rhode-Island and there planted a Colony. That a people thus situated should imbibe very extravagant ideas of religious liberty, was perfectly natural. And as they had been persecuted and banished by the civil government united with the ecclesiastical, they naturally held in utter detestation the whole system of government in the neighbouring Colonies, and even imbibed a strong prejudice against their whole system of police, their manners and habits. They became extremely jealous and fearful of the exercise of power in any form. Hence, in that Colony the most democratick government in America, the people, literally governed in every thing. This led to a perfect independence of thought and action; and when accompanied, as in many instances it was, with a native strength of intellect, they were rendered more conspicuous, by a peculiar

boldness and strength of expression, and an imposing manner which placed them in the highest rank of nature's nobility.

The Judges were elected annually by the Legislature, not for the purpose of deciding causes, for the Jury decided all questions of law and fact; but merely to preserve order, and to see that the parties had a fair chance with the Jury. And in the infancy of the Colony, when the state of society was simple, and agriculture almost the sole object of pursuit, justice might have been, and probably was very well administered, each case being decided on its own circumstances, by the application of the principles of natural justice. Since that time, however, by an astonishing increase of manufactures and commmerce, and a vast accumulation of wealth, the rights and relations of individuals have become more diversified and complex, and an independent Judiciary, with a more enlightened, settled and uniform administration of justice, has been called for by all the intelligent part of community. But the body of the people, have by the force of habit become so strongly attached to their colonial form of government, that all efforts to form a Constitution, have heretofore proved abortive. They are now making another effort,—the Legislature of that State have passed an act calling a Convention to form a Constitution; that they may succeed must be the ardent wish of all the wisest and best men, in that and in her sister States. If they do succeed in establishing an

independent Judiciary, Vermont will be the only state in the Union where the Judges are elected annually.

The views and habits of the settlers on the New-Hampshire Grants collected from the different Colonies, are clearly seen in the constitution and form of government which they established. The Legislature was composed of two Houses; one consisting of the Governor and Council, styled the Supreme Executive; the other composed of Representatives from the different towns, styled *the* General Assembly, and vested with supreme legislative power. Both branches were elected annually by the people, and by the same class of voters, as the principle of universal suffrage was adopted. Yet because the Governor and Council were elected by a general ticket, and were styled the Supreme Executive, they dared not vest them with any legislative power. But with unlimited confidence in the House of Assembly, they did not hesitate in vesting them with legislative power unlimited and supreme.

The Constitution provided for the election of the Judges of the County Courts, Sheriffs, and other County Officers, by the freemen of the respective Counties, to hold their offices during good behaviour. But as they provided for the election of the Judges of the Supreme Court, by a joint ballot of the Governor and Council and House of Assembly, they thought it unsafe to trust men thus appointed more than one year. The Legislature were authorised to erect a Court of Chancery, and the Constitu-

tion provided that at the expiration of every seven years, a Council of Censors, consisting of thirteen persons should be elected by the freemen; whose duty it should be, among other things, to enquire whether the Constitution had been preserved inviolate in every part;—whether the Executive and Legislative branches of the Government had performed their duty as guardians of the people, or had assumed to themselves, or exercised, other or greater powers than they were entitled to by the Constitution—to enquire whether the laws had been duly executed—to pass public censures—to order impeachments, and to recommend to the Legislature the repeal of such laws as should appear to them to have been enacted contrary to the principles of the Constitution—to propose amendments of the Constitution, and to call a Convention to decide on their ratification. Upon this last provision of the Constitution, Doct. Williams, in his History of Vermont, remarks, "The benefits which were expected to result from a Council of Censors have not taken place, and impartiality requires us to acknowledge, that from the experience of thirty years, it does not appear that the plan is adequate to the object."

The above are the outlines of the first Constitution, so far as is necessary to state them, in order to give a history of the Jurisprudence of the State. It was undoubtedly the best possible form of government, that could, at that time have been devised. It was that form of government, which grew out of the then condition, feelings and habits of

the people; and many of our aged and venerable patriots have a strong habitual attachment to it. They say, and with truth, that the people have enjoyed a high degree of happiness under their present form of government. But it does not follow, that it is the best possible form of government for the people in their present condition—a people who have made so great and so rapid advances in wealth and refinement.

Under this constitution of government, the Judiciary was organized in much the same manner as in the State of Connecticut, before the late improvements in their Constitution. A term of the Supreme Court was holden annually by all the Judges in each County in the State for the trial of civil and criminal cases. And during the first Septenary very little inconvenience resulted from this ambulatory system; for, as formerly in Connecticut, almost every case was settled by the verdict of a Jury, and questions of law were very rarely agitated, except on a Jury trial. The rights and relations of individuals, at that period were simple, but for reasons already mentioned, they have now become more complicated, and consequently, a more scientifick administration of justice is required.

During the first Septenary, the Legislature frequently interfered with the Judiciary department. They passed an act prohibiting the prosecution of any real or possessory action, or any action on contract. They passed acts vacating and annulling judgments. They constituted themselves a Court

of Chancery. They appointed a board of Commissioners with full power to decide in a summary manner all disputes relative to the title of lands. They also frequently granted new trials in cases which had been finally decided by the Judiciary. The powers thus exercised by the Legislature with the approbation of a majority of the people, naturally confirmed the idea, that the power of the Legislature was unlimited and supreme. No idea was entertained that the Judiciary had any power to enquire into the constitutionality of acts of the Legislature, or pronounce them void for any cause, or even to question their validity. Indeed, the framers of the Constitution could never have intended to confer on the Courts the power of pronouncing an act of the Legislature void for any cause, when they provided for an annual election of the Judges by the same Legislature who were to pass the laws.

At the end of the first Septenary, the Council of Censors in the exercise of their constitutional powers reviewed the proceedings of the Legislature for the past Septenary.

The following passages from their address to the people, distinctly shew the want of two coordinate branches in the Legislature, and of an independent Judiciary:—"Nor ought the fickleness of the Legislature and their want of deliberation in passing laws to escape the observation of this Council. Few acts of general concern but have undergone alterations at the next session after passing them, and some of them at many different ses-

sions. The revised laws have been altered, re-altered, made better, made worse, and kept in such a fluctuating position, that persons in civil commissions scarce know what is law or how to regulate their conduct in the determination of causes. If the Legislature, in this particular, have intended to be faithful guardians of the people, they have acted as very unsteady or improvident ones. It is the opinion of this Council, that the General Assembly, in all the instances where they have vacated judgments, recovered in due course of law, (except where the particular circumstances of the case evidently made it necessary to grant a new trial) have exercised a power not delegated or intended to be delegated to them by the Constitution. This mode of proceeding is an assumption of the Judicial Power in the last resort, and renders nugatory that important article of the Bill of Rights, which provides, that in all suits between man and man, the parties have a right to a trial by Jury, which ought to be held sacred. It supercedes the necessity of any other law than the pleasure of the Assembly, and of any other Court than themselves, for it is an imposition on the suitor to give him the trouble of obtaining, after several expensive trials, a final judgment agreeably to the known established laws of the land, if the Legislature, by a sovereign act can interfere, reverse the judgment, and decree in such manner as they, unfettered by rules shall think proper. If such is their constitutional authority, it would be a mercy to prohibit any other person than themselves, the exercise of judicial powers.

The Legislative body is in truth, by no means competent to the determination of causes between party and party, nor was by our Constitution, or that of any other country, who make pretences to freedom, ever considered so, not taking into view the amazing expense that it would bring upon the publick, and the disadvantage of its engrossing that time, which ought to be occupied in their more proper and important employment of legislating. If one set of men are to enact and execute our laws, and when they do not find one to answer a particular purpose, to make it instanter, or in other words if they are to possess all the authority as judges, which they as legislators are pleased, from time to time to confer on themselves, unhappy indeed is the lot of this people." This was in the year 1786 before the adoption of the Constitution of the United States, and before it was ascertained that in a Republican Government, to secure the people in the full enjoyment of their civil rights, it is indispensible that the powers of the Legislature be limited, and that practically they cannot be limited but by an independent Judiciary, without which, declarations of rights and limitation of power become a dead letter.

The Council of Censors it appears had learned from experience the necessity of limiting the powers of the Legislature, of prohibiting them from an interference with the Judiciary department, and, for this purpose, inserted the following article in the Constitution which was adopted :—" The Legislative, Executive and Judiciary departments

shall be separate and distinct, so that neither exercise the powers properly belonging to the other." Yet as they provided for an annual election of the Judges, it is evident that they considered this article as merely directory. They did not at that time consider such Constitution established by the people, to be in its very nature the supreme law of the land, of course paramount to all laws enacted by a Legislature, deriving all their power from the same Constitution. Nor did they conceive that Courts would consider it as such, or, that they would pronounce any act of the Legislature void, as being repugnant to the Constitution. That these were the views of the Council of Censors who framed our present Constitution, is, however, not left to conjecture. In page 537 of the Vermont State Papers will be found conclusive evidence that they never entertained an idea that the Courts were vested with power to set aside, or declare void an act of the Legislature, as being repugnant to the Constitution, or to give any redress to the person whose rights should be violated by such act. After having censured the Legislature for passing a certain act, which was, clearly, a gross violation of the Constitution, they conclude, "And this chain of adamant would be effectually rivetted, as redress, without a dissolution of the Government, could not be expected; none but the Legislature, whose interest it would be to withhold it, being competent to give it." And long after the period to which we have alluded, the doctrine that the Constitution is the supreme

law of the land, and that the Judiciary have authority to set aside and pronounce void all acts of the Legislature repugnant thereto was considered anti-republican. If it be so, it is because it maintains the authority of the master over the servant—the authority of the people over the Legislature.

It has become a self-evident proposition, that the people have a right to establish such form of government as they please; yet it will be but a mere form, unless the power of the Legislature be limited; and no other method has been devised, and probably none other can be devised, to render such limitation effectual, than that of establishing an independent Judiciary. Experience has shewn, that the Representatives of the people in a Legislature, with unlimited powers, form a body dangerous to the liberties of the people. They consider themselves as the people collected in a body, and are disposed to exercise all the power which such body would in fact possess. Beside, it is the great business of a Legislator, not to inquire what the law is, to seek after a settled rule by which his conduct is to be governed, but to decide what the law shall be: and he naturally imbibes a habit and temper of mind, adverse to all control, or limitation of power. This is more apparent in a Legislature, consisting of one popular Assembly. The members acquire a more inveterate habit of acting according to their sovéreign pleasure, and from their situation are very much exposed to act without any restraint, either moral or constitutional.

And if there be another branch of the Legislature vested with power only occasionally, to disturb them in their career of legislation, without having any efficient check upon them, they become the more impatient of control, and more obstinate.

On the other hand, it is the business of the Jurist, to ascertain what the law is; it is the business of his life, and he not only acquires a habit of submitting to it—of being governed by it, but he becomes attached to the law as a system, to learn *which* has cost him so much time and labor. Hence we find that Jurists in the Legislature, are more cautious in the exercise of their constitutional powers, and more opposed to alterations of the law and innovations upon their favourite system than any other class of men. It is obvious then, that the Judiciary is the only proper board to confine the Legislature within the limits prescribed by the people in the Constitution.

Since the adoption of the Constitution in 1786, the Legislature have not so frequently passed acts violating the rights of property, or vacating and annulling judgments; but they continued to grant new trials, for some years, it is believed, with little opposition. But the increasing light of science and experience, since the Constitution of the United States was adopted, having rendered the principle familiar, that a constitution of government established by the people, is the supreme law of the land, and an act granting a new trial being emphatically a Judicial act, it has been contended that such act is a palpable violation of the Consti-

tution, and therefore void. The Legislature, notwithstanding, feel that they have the power to grant new trials, and if they cannot tell whence it is derived, they feel themselves fully competent to its exercise in the most perfect manner. And the people of Vermont can never be secure against acts of the Legislature, violating the rights of property, especially in times of party excitement, until the Legislature shall be composed of two co-ordinate branches, and the Judges of the Supreme Court shall hold their offices during good behaviour. Until the Constitution shall provide for this, we must suffer under a constant change of the statute laws, nor can we expect the most perfect system of Jurisprudence. In despotic governments, the laws are framed by the Prince; and having an interest in the welfare of his subjects, as they and the property which they possess are his, he will provide the most beneficial code, as between subject and subject. By the aid of the most enlightened Jurists, he will enter into all the minutest details of municipal law, and may render it remarkable for the equity of its provisions, as between subject.—Still as between the crown and the subject, there is no law—no security. To freemen, therefore, the whole system is utterly detestable.

In free governments, like our own, the people are not only the absolute owners of the property which they acquire, but, if I may so say, are the owners of the government itself. But in such governments the laws must be enacted by a majority in a popular assembly, and are continued, altered, amended

or repealed, at the will of a majority. Hence the necessity, in free governments, of enacting general laws, drawing by statutes a mere outline of a municipal code to be filled up by the Judiciary. To descend into all the minutest details of municipal law, is utterly impossible: every question being decided by a majority of votes. To attempt this would be to fill the statute books with a heterogenous and discordant masss, so utterly inconsistent and unintelligible that they could neither be understood by the people nor enforced by the Courts.

It has, therefore, been found from experience, that in free governments, no full, intelligible and uniform municipal code can be established by the Legislature, and that it can be established by an uniform and settled course of Judicial decisions only. And as from the imperfection of our nature the most enlightened Jurists must occasionally differ, the necessity of a permanent Judiciary is obvious.

The Council of Censors who framed our present Constitution it seems, expected that such provision would be made at the end of the then next Septenary. At that time, in the infancy of the State, they considered that men could not be found the most capable, and fit to be placed permanently in office. In their address to the people, Vermont State Papers, p. 532, they say—"In the proposed alterations [of the Constitution] we endeavored to guard in future against what is deemed by this Council, *our circumstances considered*, to have been

an error in the Constitution—electing persons to Judicial and Executive offices, during good behaviour: as it invested them with estates in their offices, which, without an alteration of the frame of government, cannot be legally taken from them, but by proving, in a judicial course of proceeding, instances of mal-administration. We therefore left it in the power of the Governor, Council, and House of Assembly, (whom we view in the present condition of the State, to be most competent to the election of Judicial, and the several Executive officers, which, in the proposed alterations, they are authorised to choose) annually to leave out any one who shall be found unequal to, or otherwise improper for, his trust, and appoint a more suitable person in his place. *But this Council is not without hope that the ensuing Septenary will furnish men so adequate to those offices, that the tenure of them may, consistent with the public interest, be put upon a more stable footing.*"

They were not aware, that in the mean time the people would become attached to the government under which they lived, by a habit too strong to be overcome.

But under any Judiciary system, it is necessary that reports of all decided cases be made, and published for the direction of the Courts, and for the information of the people.

The Judge has a discretion in ascertaining what the law is—when ascertained, he is bound by it. If the law be unsettled, or unknown, the discretion of the Judge is unlimited; and the Judge governs,

not the law. This must be the case in a great degree, unless the decisions of causes are preserved, so that the Judge may advert to them.

The Legislature seem to have entertained some idea of this, when in the year 1797 they passed an act requiring that each Judge of the Supreme Court, should make out his opinion in writing, and deliver it to the Clerk to be recorded in a book to be kept by him for that purpose. But it might have been foreseen that it was impossible for the Judges to comply with this requisition. The Judges made a circuit annually, holding a Court in each County for the trial of civil and criminal cases, and cases in Chancery. Under this system, the Judges could not possibly find time to consider the cases sufficiently to render judgments satisfactory either to themselves or to the suitors: how then could it have been expected, that each Judge could, in each case, make up and deliver to the Clerk his opinion in writing? This provision neither was nor could be complied with in any case. Gradual advances, however, were made towards an uniform system of Jurisprudence, greatly retarded by a frequent change of the Judges, and at times by high party excitement, when the Judges were appointed for a purpose far different from that of providing for an enlightened and impartial administration of justice. And we must ever be exposed to these evils so long as our present form of government shall remain; for let whatever party will prevail, it must be composed of men governed by like passions strongly excited.

In the year 1813, the Legislature made an important change in the Judiciary by establishing the Nisi-Prius system. They provided that one term should be holden annually, by one Judge in each County, for the trial of issues of fact, and one term by all the Judges for the trial of issues of law and cases in Chancery. This produced a new era in the Jurisprudence of Vermont. The various common law modes of separating the law from the facts were adopted. It operated as a stimulus to the member of the bar. They at once found that the Jury could only settle the facts in the case, and that all questions of law must be finally settled by the Court, and the people had in prospect a more enlightened and uniform system of Jurisprudence. But several causes operated to render this system unpopular. It was not made necessary to return the postea to the law term for judgment on the verdict; but the Judge at Nisi-Prius was authorised to render judgment and issue execution, unless exceptions were taken to his opinion and allowed by him. This led the recovering parties to expect judgment and execution on the verdict, but they were in most cases disappointed, and consequently complained loudly of unnecessary delay. Besides, it required time for the Court to settle a practice best adapted to the new system, and in this, they were interrupted by a frequent change of the Judges; and some there were, who doubted whether we can avail ourselves of the benefits of a Nisi-Prius system, while the Judges are appointed annually by the Legislature, as it is obvi-

ously necessary, to render the system either popular or useful, that each Judge have sufficient experience, and such other qualifications, as that he will separately form a competent Court. This system, however, was continued until the year 1821, when the Legislature, seeing and feeling sensibly the evils of the existing system, and having in the course of eight years forgotten those which attended the former, abolished the Nisi-Prius system and restored the former.

But, although we have returned to the former Judiciary system, to the former practice under that system, we never can return. Neither the Court, the Bar, nor the Suitors will ever again be satisfied with decisions of questions of law made on a sudden upon a Jury trial; but they are, and must be, re-examined, as they were under the Nisi-Prius system. The people will never be satisfied with a different course. The consequence is, that much more time is required to do the business in the different Counties than was required under the ancient practice. Under that practice all questions of law and fact were finally settled on the Jury trial. Seldom was a motion for a new trial made, and if made was soon disposed of, the Court abiding by their first decision. And when the Jury trials were completed, very little business remained with the Court; whereas, under the present system of practice, more time is required for the trial of issues of law, than for the trial of issues of fact. The consequence is, that all the business cannot be done—a great part remains un-

finished in the different Counties. It is true, that in the year 1822, the Court, finding but a small number of old causes on the docquets, the business having been finished under the Nisi-Prius system, were able to do most of the business.—Since that time, however, the causes, for the reasons above stated, have been accumulating, so that the Judges, the present year, with the most unremitted industry will not be able to do more than one half of the business in most of the Counties. This is an evil severely felt by the suitors, and it remains with the Legislature to provide a remedy.

Reports of decided cases, will, in time, afford some relief, as business will be done with more despatch—many questions, the discussion of which now occupy a length of time, will not be made, or if made will be decided without argument. But this effect will be scarcely perceptible for a length of time. Some volumes of Reports must be published before their good effects will be perceived.

Reports have occasionally been published by individual enterprize; but, at so great intervals of time, that their effects have been scarcely perceptible. The Legislature made no provision for reporting the decisions of the Supreme Court until their session in October, 1823, when they passed an act providing for the appointment of a Reporter. Having received the appointment, I enter upon the duties of the office, with a fearful apprehension that they may not be acceptably performed. On this subject I feel a high degree of solicitude,

knowing that on the utility of the Reports which shall be made, and on the patronage and support which they shall receive, will depend a continuance of the system so wisely established by the Legislature. Could I believe that the utility of the Reports and a continuance of the system will depend on my unremitted exertion to render them valuable, or on the liberality of the profession, I should feel little anxiety on the subject.

The act of the Legislature makes it the duty of the Reporter to prepare and publish such of the former decisions of the Supreme Court as he shall judge proper. On examination I find a number of former decisions which it will be useful to report: I shall first prepare and publish them, and then proceed to publish the decisions of the Court, in the order in which they shall be made. At the request of a number of Gentlemen of the Bar, I have selected a few cases from Chipman's Reports, as they are out of print, and but a small portion of the profession are possessed of them. I shall then report a number of cases decided previous to the year 1813, when the Nisi-Prius system was established. In most of these cases, the opinion of the Court was delivered in charging the Jury, which, in many cases, renders a detail of the evidence necessary. If there are objections to this mode of reporting, they are chargeable upon the then existing Judiciary system, and will verify what the experience of ages has shewn, that the Nisi-Prius system is the most perfect that human wisdom has ever devised, and renders it obvious that under

the present organization of the Judiciary, it is necessary as far as possible to pursue the practice which was adopted during the continuance of the Nisi-Prius system.

Middlebury, April 12, 1824.

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ERRATUM.

In Preface, page 16, line 3 from bottom, after the word *heresy*, insert—The Puritans contended that it belonged to the Church to establish Articles of Faith, admitting that it belonged to the civil power to punish heresy.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

PAINE *vs.* ELY and others.

Particular jurisdictions derogating from the jurisdiction of the Courts of Common Law, are to be taken strictly, and cannot be extended farther than the statute giving the jurisdiction will warrant.

If a prisoner, being Principal in a bond for the liberties of the prison, depart without being lawfully discharged, the sureties in the bond are entitled to no particular favor, but in every such case are equally liable with the Principal.

Orange, December, 1789.

THIS was an action on a bond assigned by the Sheriff of Windsor County to the plaintiff, conditioned, that Joel Ely, then a prisoner in the common gaol in said Windsor, on execution in favor of the plaintiff, should not depart the liberties of said prison, &c. (in common form.) Breach assigned, that the said Joel did depart, contrary to the condition; whereupon, &c.

Buck, for the defendants, pleaded in bar, in substance, that after the execution of said bond, viz. on the 29th day of June, 1789, the said Joel Ely made application to Elias Weld, one of the Judges of the County Court, for said County, who thereupon issued his citation for the said Paine to appear at ——— on ——— before Elijah Robinson, one of the Judges of the County Court for said County, and John Weld, Justice of the Peace, to shew cause why the said Joel should not be admitted to the insolvent debtors' oath, which citation was regularly served, &. That on ——— at ———

Orange, December, 1789.

Paine vs. Ely et al.

the said Robinson and Weld proceeded to examine the said Joel, and did administer the oath, and give a certificate thereof agreeably to the statute in such case made and provided. That the said Joel thereafter remained within the said prison and the liberties thereof, for the space of twelve hours—that no provision being made for his support, as directed by the statute, he departed; that until that time he had remained within the liberties of the said prison, according to the condition of the said bond.

To this there was a demurrer and joinder.

Hutchinson and *Jacob* for the plaintiff, contended that the statute in this case has created a summary jurisdiction, that the Justices derive their authority solely from this statute, that they must pursue their authority precisely as pointed out by the statute, otherwise the whole is *coram nor judice*. The statute requires that on application of a debtor confined, &c. to two Justices of the Peace, one of whom shall be judge, &c. they, or either of them, shall issue a citation to the creditor or creditors, at whose suit, &c. notifying them to appear before such Justices at a time and place therein mentioned, to shew cause, &c.—that the citation in this case was not issued by the Justices who administered the oath, or either of them, therefore they had no jurisdiction. One set of Justices are not empowered by the statute to convene the creditors before another set of Justices.

Buck, for the defendants, contended that the statute, as it provides for the relief of poor debtors, is remedial, and ought to be construed liberally. Elias Weld had a right to issue a citation; elijah Robinson and John Weld are such Justices as have a right to hear, examine, and administer the oath. There cannot therefore be a want of jurisdiction, as urged by the plaintiff's counsel.

It is likewise a case against bail, who ought to be favoured.—It would be hard that either bail or principal should be accountable for the doings of the Justices—their proceedings, if irregular, ought to be reversed; but until reversed, ought to be deemed valid—otherwise, sheriffs and gaolers, who are no judges in this matter, may also be exposed. It was also insisted that "such Justices" in the statute does not mean the same Justices who issued the citation, but similar Justices;—had it intended the same Justices, the word "aforesaid" had been used.

The plaintiff's counsel in reply. This is not a remedial statute,

if it gives a privilege to the debtor, at the same time it takes away the common law right of the creditor. It is a rule that all summary jurisdictions must confine themselves strictly to their powers. Neither writ of error nor certiorari will lie; if advantage cannot be taken of the irregularity in this way, the creditor has no redress, be the proceedings ever so illegal and unjust.

CHIPMAN, Ch. J. The statute in question gives a privilege to the debtor, in derrogation of the common law right of the creditor; the right of holding the debtor in custody until he obtain legal satisfaction. This privilege is given to the debtor, not for his own sake, but for the sake of the publick, who are interested in his labour, and in favour of humanity. The debtor does not demand a remedy against the creditor for an injury he has sustained, the statute is not, therefore, technically speaking, remedial; but the case does not turn on this point. The question is, whether there has been any fatal irregularity in the proceedings of the Justices, and whether the plaintiff can take advantage of it in this action.

The jurisdiction of the Justices, in the case under consideration, is in derogation of the jurisdiction of the common law Courts—the proceedings are summary, not warranted by the course of common law proceedings, but warranted solely by the statute. Blackstone observes, after Sir Edward Coke, that "Particular jurisdictions derogating from the general jurisdiction of the Courts of common law are ever taken strictly, and cannot be extended farther than the express letter of their privileges will warrant." This observation is applicable to the mode of proceeding in the case under consideration, as well as to the jurisdiction of the Justices. The mode is pointed out and regulated, not by the common law, but solely by the statute; and must be strictly pursued. A different mode cannot be adopted, under pretence of its being more convenient for the debtor, or for the Justices. This would be to assume an arbitrary power not warranted by law. In this case there has been clearly a deviation from the mode prescribed. The words of the statute so far as relates to the present question, are, "on application to two Justices of the Peace, one of whom shall be a judge," &c.—They, or either of them shall issue a citation to the creditor or creditors at whose suit the prisoner is confined, notifying him or them to appear before *such* Justices, &c. The word 'such' is here a relative, referring to the Justices to whom application has been made, and who

Orange, December, 1789.

Paine vs. Ely et al.

have issued the citation, and has precisely the meaning of this expression:—"the same Justices to whom application shall have been made as aforesaid." In the same sense the word occurs not less than ten times in this paragraph. To give it the construction contended for by the defendant's counsel, would run the statute into absurdity and nonsense:—thus, "On application to two Justices, &c. they, or either of them, shall issue a citation to the creditor or creditors, &c. to appear before some such-like Justices, &c. which citation shall be served on some such-like creditor or creditors, at least twenty days before the time of appearance in some such-like citation, &c." It is clear from the statute that Elias Weld had no power to issue a citation to the creditor to appear before any Justices, of whom he was not to be one. This jurisdiction is not incident to the office of Justice, but is given by the statute to those, to whom application is made. It might have been given to any other class of men, as for instance, to any two freeholders, to whom application shall be made. Had that been the case, no one would have thought, that one freeholder might have cited the creditor to appear before other freeholders. The consequence is that the proceedings of Elijah Robinson and John Weld are wholly irregular. The only remaining point is whether the plaintiff can take advantage of such irregularity in this action. "There is great difference between erroneous process, and irregular (that is void) process; the first stands valid and good, until it be reversed; the latter is an absolute nullity from the beginning. The party may justify under the first, until it be reversed; but he cannot justify under the last, because it was his own fault that it was irregular and void at first." 3 Wils, 341. Parsons vs. Lloyd. 2 Black. Rep. 845.

The citation was irregular.—The whole proceedings are, therefore, void from the beginning, and do not stand in the plaintiff's way. Beside there is no mode of reversal in this case.

The bondsman is entitled to no particular favor; he has engaged against the default of the principal; to admit any excuse for him which would not equally avail the principal, would be to deprive the sheriff or the creditor of their indemnity. As to the principal, every man who procures a process (or indeed any proceeding at law) in his favor, must see that it be regular at his peril.

SMITH and KNIGHT, Js. were of the same opinion.

Judgment for the plaintiff.

OLIVER *vs.* CHAMBERLIN, Sheriff.

Orange, December, 1789.

In an action for an escape on mesne process, the plaintiff is entitled to the amount of his debt, if it appear that his debtor has absconded and is insolvent; but before the Court will render judgment on the verdict, plaintiff must enter into a rule, that defendant may make use of his name in recovering the debt to his own use; defendant indemnifying plaintiff from cost.

ESCAPE on mesne process for suffering one Gile, arrested at the suit of Oliver, to go at large.

Plea—*The General Issue.*

It appearing that Gile had absconded and was insolvent, the Jury found for the plaintiff his whole debt in damages.

But before the Court rendered judgment on the verdict, they directed the plaintiff to enter into a rule, that the defendant should have the benefit of the judgment, which had been obtained against Gile, the defendant indemnifying the plaintiff from cost, which was done accordingly, and judgment was rendered for the plaintiff for the whole of his debt. 2 Ld. Ray. 1411. Powell vs. Hord. 1 Stra. 650.

JOHN DOE ex dem. CHAPIN *vs.* SCOTT.

If a plaintiff in ejectment fail of shewing a title to the whole of the land described in his declaration, he may still recover a part in severalty or an undivided part according to his title.

THIS was an action of ejectment for lands in Weathersfield.

Windsor, December, 1789.

It was objected, that the plaintiff had proved a title to no more than three fourths of the lands in question; that as he had demanded the whole, he had failed in his proof.

CHIPMAN, Ch. J. In ejectments, the plaintiff shall recover according to his right: if the whole be demanded, the Jury may find for a moiety, and it is good. 1 Bur. 326.

SMITH and KNIGHT, Js. concurred.

Orange, December, 1789.

D. MORRISON and P. FREEMAN *vs.* W. SHATTUCK, J. BOND, R. RICE and A. SAWYER.

In Chancery.

If A. convey land to B., and B. neglecting to record his deed, convey the land to C., and D. having a knowledge of said conveyance, fraudulently procure from B. his unrecorded deed—deliver it back to A. and take a deed to himself from A. and convey the land to E., E. having no knowledge of the aforesaid conveyance, E. as a bona fide purchaser will hold the land against C.

And if C. convey the land to F., he having full knowledge of all the above facts, F. is not eptitled to a remedy either at law or in equity against D.

THIS was a bill in equity, setting forth that in the year of our Lord 1752, W. Williams by virtue of a deed duly executed by Coates the original proprietor, was seized in fee of Right No. 1, in Halifax, in the State of Vermont. That in the same year, the said W. Williams, by deed under his hand and seal duly executed, conveyed Right No. 1 aforesaid, to H. Morrison, now deceased. That from the time of the said W. Williams' said purchase, until the year 1783, he was possessed of a good deed from the said Coates to himself of the same Right. That on the 15th day of May, 1754, the said H. Morrison, by deed under hand and seal, duly executed, conveyed the said Right to J. Morrison, who on the 29th day of February, 1788, by deed, &c. conveyed the said Right to the Orators, except one hundred acres on the west side of said Right. It was further charged in the bill, that the deed from the said Coates, not being recorded, W. Shattuck, in April, 1783, by misrepresentation, obtained it from the said W. Williams—that the said Shattuck knowing that the said H. Morrison had a deed from the said W. Williams, and the said J. Morrison from the said H. Morrison of the said Right No. 1, with an intent of defrauding the said J. Morrison, for a trifling consideration, on the 26th day of June, 1783, obtained a deed from the said Coates to himself, and gave up to the said Coates the deed given to the said W. Williams, as aforesaid; the said Coates then being incapable of transacting business. The bill further charges that the said Shattuck afterwards sold the said Right No. 1 to Jonas Bond, who in September, 1786, sold two hundred acres, part of said Right, to Reuben Rice and William Rice, and on the first day of March, 1787, the said Jonas Bond sold fifty acres, part, &c. to James Knapp, and in December, 1787, sold

the remainder to Abner Sawyer.—That the said James Knapp claims no part of the Right conveyed to the Orators.—That the said Reuben Rice, William Rice, and Abner Sawyer had brought an action of ejectment for the said Right, against the Orators, which is now pending, and that they are without remedy, save in this Court, &c.

They therefore pray an injunction to stay proceedings at law, that the said deed from Coates to Shattuck may be set aside, and the said Reuben Rice, William Rice and Abner Sawyer may be decreed to release to the orators or grant such other relief, &c. To which bill the defendants, W. Rice, R. Rrice and A. Sawyer demurred: Shattuck, the other defendant, also demurred severally. The defendants, W. Rice, R. Rice and A. Sawyer were first heard on the demurrer. For these defendants it was insisted, that by the plaintiffs' own shewing, the defendants have not been guilty of any fraud; they have purchased the title, *bona fide*, without notice of any equity in another. At the time of their purchase, there was no pretence of right in the plaintiffs, who have since purchased and revived a dormant claim. The persons under whom the plaintiffs' claim were negligent in not recording the title deeds. Whatever equity H. Morrison might have had against Shattuck, yet neither H. Morrison nor the present plaintiffs could have any against these defendants.

For the plaintiffs it was contended that the Court will assist in aiding defective conveyances, and even supply a deed that has been destroyed. It is immaterial what parties are concerned, the sale of the land by Shattuck can make no difference. It might have passed through several hands, before Shattuck's fraud was known. The vendee cannot be in a better situation than the vendor. The title of Shattuck being void by reason of the fraud, the subsequent or derivative titles must likewise be void.

Per Curiam. The bill charges that these defendants purchased of Shattuck; they are not charged with fraud personally, or even with notice of the title, under which the plaintiffs claim; they are therefore to be taken to be *bona fide* purchasers without notice. It has been long settled, that if A. sells to B., who forgets or neglects to register his deed, and C. knowing the same, purchases the same land from A. and first registers his deed, and sells to D., who pur-

Orange, 1789.

Morrison *vs.* Shattuck.

chases *bona fide* for a valuable consideration, without notice of B's right; D. shall not be affected by C's notice, but he shall hold against B. 1 Bur. 474. Worsley et al. Assignees of Slader vs. De Mattos & Slader.

The bill as to the defendants, W. Rice and R. Rice, and A. Sawyer, must be dismissed, with costs against the plaintiffs.

For the defendant, Shattuck, it was contended, that the plaintiffs, at the time of the fraud alleged, owned nothing; they are to be considered as purchasers of a mere equity, which will not entitle them to maintain this action, that neither were in fact in possession.

For the plaintiffs it was said, that any subsequent purchaser had a right to disencumber.

Per Curiam. The plaintiffs do not stand in the place of heirs or representatives of H. Morrison. H. Morrison had been defrauded of his title to the land in question; after which, and with notice, (since it is not denied, and they are supposed to make the best of their own case) the plaintiffs have purchased.

The injury was not done to them;—they have no right in their own names, to a remedy in this suit. The bill as to the defendant, Shattuck, must be dismissed, but without costs.

KNIGHT, J. did not sit in this case, having been of counsel for the defendants.

SELECTMEN of BENNINGTON *vs.* McGENNES.

A party to a suit cannot be admitted as a witness.

Monies expended by the overseers of the poor for the support of a pauper, cannot be recovered of such pauper, without a special contract for repayment.

Indebitatus assumpsit, for money paid, laid out, and expended.

Plea—*Non assumpsit.*

Bennington August, 1790.

It appeared in evidence, that in the year —— the defendant was resident at Bennington, but had gained no legal settlement therein. The defendant, his wife, and two or three children were taken

sick and in distressed circumstances, being poor and unable to provide for themselves. The Selectmen of Bennington provided for them as paupers, and advanced, for their relief the sum demanded in the declaration. The wife, and one or more of the children died. The defendant, on his recovery, removed out of the State, and returning afterwards on business, the present action was brought.

Bennington 1790

Selectmen of Bennington *vs.* McGennes.

A motion was made that one of the plaintiffs, a Selectman, might be sworn, to prove a special agreement of the defendant to repay.

By the Court. He cannot be admitted.

Chipman, Ch J., in his charge to the Jury observed—This is an action wholly unsupported by precedent, and the question is, Are there any principles of law or reason on which it can be supported? The action is brought by the town against a pauper, to recover back money, which the town had expended for his relief. There is in this case no special agreement to repay. It rests on the general implication of law in such cases. As the money was advanced, if the law implies, generally an obligation on the part of the pauper to repay such monies, as the town may have advanced for his relief, then the plaintiffs ought to recover. This may be gathered from the intention of the law, in the provision made for the relief of the poor. The provision made, by law, for the relief of the poor is, in my opinion, a charitable provision. To consider it in any other light, detracts much from the benevolence of the law, and casts a reflection on the humanity of the richer part of community. Poverty and distress give a man, by law, a claim on the humanity of society for relief; but what relief, if the town have a right immediately to demand a repayment, and to imprison the pauper for life, in case of inability to pay? This, instead of a relief, would be adding poignancy, as well as perpetuity to distress. If this be so, certainly the law raises no promise.

Verdict for defendant.

Windham,
August,
1790.

LYON *vs.* IDE.

A person acting under authority must strictly pursue his authority.

If the condition of a bond, given under the statute, for admission to the liberties of the prison, contain any thing more than is provided by the statute, or materially vary from the condition prescribed, it is void.

THE plaintiff declared as assignee of the Sheriff of Windham, on a bond given to the Sheriff by the defendant in the penalty of £200, that if one Joseph Bullen, then a prisoner confined for the plaintiff's debt, should behave as a good orderly prisoner ought to behave, and should pay to the gaoler one shilling and six pence per day for his victualling, and pay the gaoler's fees, and not depart said prison without the leave and liberty of the Sheriff, then, &c.

Bradley, for the defendant, pleaded three several pleas in bar. To the first and third pleas there was a traverse and issue; to the second, which in substance was, that the bond was taken for admitting the said Bullen to the liberties of the prison—that it was taken by the Sheriff in his own wrong *colore officii*, for other things than the law allows, viz. for the prisoner's good behaviour—for his diet, and to secure the gaoler's fees, and that he should not depart without leave of the Sheriff, &c. There was a demurrer and joinder.

Bradley, for defendant.

Knight, for plaintiff.

CHIPMAN, Ch. J. delivered the opinion of the Court. This is an action on a bond taken by a Sheriff in the execution of his office, for admitting a prisoner, confined in gaol for debt, to the liberties of the gaol yard, under the statute regulating gaols and gaolers, and by the Sheriff assigned to the plaintiff, the original creditor.

As the bond and condition are inserted at large in the declaration, and as the final recovery, in this action, will depend on the legality of the bond, it will be unnecessary to consider the defendant's plea: For on this demurrer, if the declaration be not good, or in other words, if the bond be illegal, the plaintiff cannot recover in this action; and nothing is disclosed in the defendant's plea, that is not apparent on the face of the declaration.

Windham, August, 1790.

Lyon vs. Ide.

A person acting in his private capacity, may annex what condition he pleases to his agreement, so that it is not *malum in se*, or prohibited by some positive law. But a person acting under authority, must pursue that authority, strictly; nor can he act by virtue of his authority, and in his private capacity in the same instrument. I however, at present, extend this no farther, than to ministerial officers of the law. Any person imprisoned for debt, may be admitted to the liberties of the gaol-yard, on procuring sufficient bonds, to indemnify him against an escape, which might, in such case be made. For a prisoner, admitted to the liberties, can escape when he pleases. The law cannot mean in this case, to indemnify the Sheriff, or the gaoler, who is his deputy, for any thing furnished the prisoner on a private agreement. Neither the Sheriff nor the gaoler are obliged to furnish prisoners with diet, nor is the prisoner obliged to receive his diet from them or either of them. So far from this, that the statute before mentioned expressly declares, that all prisoners thall be allowed to provide, and send for their necessary food, as they please.

No officer can be allowed to take a bond, other than such as is expressly allowed by law. Such a practice, were it to obtain, would open a wide door to extortion, and the most grievous oppression; and an officer is clearly punishable, who shall, under colour of his office, and for doing that which the law obliges him to do, as to take bail, &c. take money from a prisoner other than legal fees, or any service, either for his own benefit, or that of a third person; and any agreement, extorted for such purposes, must be illegal and void.

The bond under consideration is of the same nature, and is grossly oppressive. There is not one word about indemnifying the Sheriff, the only thing required by the statute. Instead of that, he is first bound to his good behaviour; and though he ought to behave well, the Sheriff had no right to demand it of him under a penalty. 2. He is bound to pay the gaoler one shilling and six pence per day for his victualling—a most extravagant price in this country. This is directly in face of the statute, as it is a mean of obliging the prisoner to take his food of the gaoler only. 3. He is obliged to pay the gaoler's fees. The gaoler, who took this bond in the Sheriff's name, had a right, if fees were due, to take security for their payment; but if he agreed to wait, and take them at a future day, it

Windham, 1790.

Lyon vs. Ide.

was a private concern, which ought not to have been put into this bond, taken officially. He might as well have taken security for any other debt, in the same way. 4. He is bound not to depart without leave of the Sheriff. The Sheriff is authorised to detain the prisoner, until he pay and satisfy the debt for which he stands committed, and lawful fees. When he has done that, though in close confinement he may demand his liberty, and if not presently set at large, an action lies against the Sheriff; and yet, in such case, if this bond be good, should he depart without leave of the Sheriff, he forfeits £200.

The bond is, therefore, totally bad, as being against law, the common principles of right; and in every view highly oppressive. There must therefore be

Judgment for the defendant.

Ivers ex dem. Ivers vs. Chandler.

If A. convey land to B., and afterwards convey the same land to C, B being present witnessing the deed and receiving a part of the consideration, C. will hold the land against B.

Windsor, September, 1790.

THIS was an ejectment for lands in Chester. On trial, Ivers, the lessor, derived a title by deed, from T. Chandler, sen. dated March 13, 1767. T. Chandler, jun. produced a deed of the same land, from T. Chandler, sen. dated July 30th, 1766. There was endorsed a proof, by one of the witnesses, before a Judge Lord, who had long been in a state of insanity and now is dead. It was strongly insisted that the deed was a forgery, and there were many suspicious circumstances.

It further appeared in evidence, that the defendant was present at the time of Ivers' purchase—that he was a witness to his deed, and received part of the pay to his own use.

The Court directed the Jury, that if they found the defendant's deed was originally made *bona fide*, yet if they found that he was knowing to Ivers' purchase—a witness to his deed—received part of the purchase money, and fraudulently concealed his own claim,

they ought not to allow so gross a fraud to prevail against a *bona fide* purchaser. It ought by a retrospect, to be considered as originally fraudulent, and designed for an imposition.

Windsor, September, 1790.

Ivers *vs* Chandler.

Verdict for the plaintiff.

MORRIS ex dem. LUDLOW *vs.* GILL.

Fraud fully proved invalidates every transaction, as well at law, as in equity. If A. convey land to B., who neglects to record his deed, and A. convey the same land to C., who procures his deed to be first recorded, yet if C. at the time he received his deed from A. had knowledge of the prior conveyance to B, his deed *is* fraudulent and void, and B. will hold the land.

Windsor, September, 1790.

EJECTMENT for lands in Weathersfield, originally granted to H. Wentworth. Wentworth conveyed to G. Alexander 9th April, 1767—Alexander to Ludlow, 6th June, 1767. Wentworth's deed to Alexander, proved and recorded, May 12, 1787, and also the deed to Ludlow as appeared in evidence on the part of the plaintiff.

On the part of the defendant, a deed was produced from Wentworth to Bean, dated 28th Dec. 1780, acknowledged and recorded soon after. 2. A deed from Bean to Gill and others, dated Dec. 28, 1781, acknowledged and recorded.

It was proved on the part of the plaintiff, that Bean and the purchasers under him, had some time before Bean's purchase from Wentworth, full and repeated notice of Ludlow's title from Wentworth through Alexander. It was insisted, that by the statute of this State, the legal title was in the vendees of Bean, as his deed was first recorded.

CHIPMAN, Ch. J., in his charge to the Jury, gave it as his opinion, that although Bean had taken advantage of the legal form required by the statute, in first recording his deed, yet, as both Bean and his vendees had notice of Ludlow's title, which was an equitable one, the whole is fraudulent, as against Ludlow. That it would be mischievous to allow such fraudulent acts to prevail in a Court of law, only to turn the parties over to a Court of equity, where they would be immediately set aside.

Fraud, if fully proved, invalidates every transaction, as well at

Windsor, September, 1790

Ludlow *vs.* Gill.

law as in equity; nor can a man validate a fraudulent act by bringing it under the letter of a statute, any more than under the letter of a rule of the common law. Had there been a *bona fide* sale, in this case, to third persons, without notice, it might have had another consideration.

Verdict for the plaintiff.

CONANT *vs.* BICKNELL.

Money collected by an officer on an execution, cannot be attached while in his hands, as the property of the creditor in the execution.

Windsor, September, 1790.

Assumpsit, for money had and received to the use of the plaintiff.

Plea—*Non assumpsit.*

It appeared in evidence that the plaintiff, a Sheriff's deputy, had an execution against Bicknell, in favour of one Woolston, a person residing abroad. The defendant counted out the money to satisfy the execution on the table, being £3, 18*s.* 8*d.*, and shoved it across the table to Conant, who thereupon endorsed the execution satisfied. Upon which Bicknell immediately laid hands on the money, and turned it out as the property of Woolston, on an attachment in his favour against Woolston, and it was by another officer, who was ready for the purpose, attached as the property of Woolston.

It was held by the Court, that money, collected by an officer on an execution, cannot be attached out of his hands. On the receipt, the officer becomes a debtor to the plaintiff, not for the identical pieces of money, but for the sum.

Verdict for the plaintiff.

Chittenden,
August,
1791.

PIERSON *vs.* HOVEY and HIBBARD.

If an execution be levied on personal property, and by the officer making the levy delivered to a third person, for safe keeping, on a receipt containing an engagement to re deliver the property to the officer, the officer does not thereby part with his lien on the property, but may take it into his possession at any time. And if the property thus receipted be cloigned by the debtor or returned into his possession, and on demand made by the officer having the execution, he refuse to turn out property, to satisfy the execution, the officer may lawfully commit the body of the debtor to prison on such execution.

THIS was an action on a Sheriff's bond for liberty of the prison, and assigned to the plaintiff, the creditor.

Plea—*Duress of imprisonment and traverse.*

The substance of the evidence was, that the plaintiff had recovered a judgment against Hovey, for £17—took out execution and delivered it to Grant, Constable of Charlotte, who took Hovey's cattle, posted and delivered them on receipt to Strong, who left them in Hovey's custody. The cattle were not brought to the post, but were cloigned by Hovey. The plaintiff had the execution returned without being satisfied, and took an alias which he delivered to Rich, then Constable of Charlotte. Rich made a demand of Hovey who refused to turn out any property; whereupon Rich took Hovey's body, and committed him to gaol in Rutland, according to the precept of the writ, on which this bond was given, &c.

It was insisted by the defendant's counsel, that this imprisonment was illegal; that property having been once taken in execution, that execution was as to Hovey discharged.

CHIPMAN, Ch. J., gave the following in charge to the Jury:

The property was not in fact, taken out of Hovey's custody, but was left in his hands, (although receipted by a third person) and was by him cloigned. Had the property in fact remained in the hands of the officer, it might have had a different consideration. Had that proved insufficient, a second levy might have been made, either with the same execution, or an alias. I do not apprehend, if an officer take property on an execution, which proves insufficient, or the property of another, he is precluded from levying on the body; or, by direction of the creditor, on land for the remainder.

On a ca. sa. in case an escape or rescue be returned, a new capi-

Chittenden, August, 1791.

Pierson *vs.* Hovey.

as may be taken out; for, "an insufficient return is as none."—The officer had taken the cattle, so far as to have a lien upon them, for the satisfaction of the execution. On receipt, I do not consider that the officer wholly parts with that lien, and trusts to the receipt only. The property is delivered out of his actual custody, for the convenience of the defendant. The officer is therefore less secure of the property, but his lien still continues. He may take it without the leave of the person receipting. As the property is out of the actual custody of the officer, to cloign it would not, in strictness, be a rescue; but to some purposes, as in the present case, might have the same effect, to render the execution ineffectual.

Verdict for the defendant.

RHODES *vs.* RISLEY.

In an action by the endorsee of a promissory note against the payee as endorser, parol evidence is admissible on the part of the defendant, to prove that he placed his name on the note in blank for the purpose of enabling A. to whom he delivered the note, to collect the note for his, the defendant's use, although A. sell the note to the plaintiff, and he fill up the endorsement to himself.

Rutland, August, 1791.

ACTION on the case, for that on the 24th day of May, 1774, one I. Parker made his note to Risley, for the sum of £53, 12*s*. 2*d*. payable in beef, pork, &c. That afterwards, to wit, on the same 24th day of May, the said Risley did by his endorsement on the said note, order the said I. Parker, for value received, to pay to the plaintiff, the said sum of £53, 12*s*. 2*d*. &c. in due form.

The note, with the endorsement, was produced and read, and it was proved, that Parker died insolvent, about the year 1778.

The defendant's counsel stated, and offered to prove, that in the year 1781, the defendant employed one Pomroy, to bring an action on the note, against one Grant, as executor in his own wrong, on the estate of Parker—Grant having married Parker's widow, and taken the estate without administering; and that Risley's name was then put on the note for the purpose of filling a power of attorney—that a suit was commenced against Grant, who, afterwards

settled—paid Risley a certain sum, about £20, and took up his note.—That Grant put off the note to J. G., and J. G. to the plaintiff, who filled up the endorsement to himself and brought this action.—And stated that the defendant had never heard of the note, since the year 1781, when Grant took it up.

Rutland, August, 1791.

Rhodes vs. Risley.

It was objected, that, if a note be endorsed blank, the endorser shall never be allowed to prove that it was for some other purpose, and not to make him liable; especially when it comes into the hands of a third person. Kirby's Rep. 393. Hungerford vs. Thompson.

Chipman, Ch. J. I have never been satisfied with those decisions which introduce an arbitrary custom, to bind a man contrary to his express agreement, and the real equity of the case. If, however, such custom have generally prevailed in a State—have been authorised by judicial decisions, and property be involved in its continuance, it ought not rashly to be shaken. In this State, I apprehend, such custom as here contended for, has not generally prevailed. There have been no leading decisions in the Courts of law on the point. The matter, therefore, lies open to investigation. It is said if a man sign his name blank on a note, which he transfers, the endorsee may fill it up with a power, or a general endorsement, for value received; and from the nature of the transaction, the endorser shall be bound, and that he shall never controvert the right, notwithstanding any agreement made at the time of the transfer. We lay aside custom, and go on the footing of common justice between parties. A. sells a note to B., and to enable B. to recover of the maker, endorses his name blank on the note. At the same time it is fairly agreed, that B. shall risk the ability of the maker of the note, and shall, on his failure, have no demand on A. In this case, A. is in common justice and honesty, under no obligation to B. on failure of the maker. Nay, B. cannot, with a good conscience, demand any thing of A. The endorsement, though filled up by the endorsee, may be, *prima facie*, evidence of an obligation on the endorser, but it is only *prima facie* evidence, and in justice, should be allowed to be controverted. What ought to be decisive in this case, is, that if the endorser make use of the endorsement contrary to agreement, to the damage of the endorser, he is answerable in

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Rhodes *vs.* Risley.

damages. This has been clearly decided in Great Britain, where the negociation of notes is carried to its greatest length. This was the great point decided in Moses vs. Macpherlan.—2 Bur. 1005. 1 Blac. 219. Moses endorsed four notes to Macpherlan, under a special agreement, (in a separate memorandum) that Macpherlan should indemnify him against all the consequences of such endorsement. Macpherlan brought his actions, on the several endorsements, against Moses before an inferior Court. The Court refused to hear the evidence of the agreement, and gave judgment against Moses, who, thereupon, brought his action against Macpherlan to recover back the money so unjustly recovered. And it was solemnly determined that an action would lie. This is to say, the endorser is in such case holden, and is not holden. The evidence which could not be admitted, to save him from an unjust payment, could be admitted and thought amply sufficient, in another action, to recover back the identical money. However, it was observed by Lord Mansfield, in that action, that the inferior Court did right in not going into the collateral agreement, otherwise they might have gone into matters, which exceeded their jurisdiction. This reason seems to imply, that a superior Court might and would have gone into the whole matter.

Let us now consider the nature of the transaction, as it stands between the original endorser and the subsequent endorsee. And in considering this point, I shall not feel myself bound by foreign precedents, but by the principles of common law, which are, the principles of common justice, as they apply to the general circumstances and situation of this State.

In Great Britain, they consider the endorsee as giving credit, as much to every prior, as to his immediate endorser. This, it is said, is established by the course of trade, and is for the benefit of commerce. This is at least problematical. But as this State is not, and from its local situation cannot be greatly commercial, this may be laid out of the question. The case will then stand thus:—A. sells a note to B. at the risk of the purchaser, and endorses it blank. In this case it is unconscionable in B. on the failure of the maker of the note, to demand the money of A. But B. has sold the same note, still endorsed blank to C. The question is, whether B. can give a greater right than he had himself. A's name is on the note;

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Rhodes, *vs.* Risley.

this may prove that B., the possessor, has a right to use, or sell, and nothing more, independent of the custom. C. contracts with B.—to *B.* he ought to look for the right which he purchases, whether it be a right against the maker only, or whether A. is to warrant in case the maker shall fail. If B. deceive C., he alone shall be answerable. The fraud of B. ought not to injure A. Let each trust where he contracts. *Caveat emptor* may with great justice be applied in this case. The same hard, technical reasoning has prevailed, in some laws against the makers of a negociable note in the hands of an endorser, where a payment not minuted on the note, has been made before the transfer. But in some of the neighbouring States, the same principles of common justice, which I now go upon, have prevailed in this point. The Courts have made it a rule to allow all payments *bona fide* made before the transfer, or rather, before notice, and the endorsee must look to the endorser for so much.

This differs only in name: the reasons go the whole length of the present case. The evidence ought to be admitted.

As to the other point, of a long time having elapsed, without notice given to the endorser, it is on the part of the plaintiff to prove due diligence, and reasonable notice of failure, it is not in the present question.

Verdict for the defendant.

Windsor, September, 1791.

JACOB ex dem. PAINE and MORRIS *vs.* SMEAD.

Grants of land in this State by the Governor of New-Hampshire, while this territory was within that Province, are in their construction and operation Royal Grants, and on a surrender of such Grant, the King was in of his former right, and might, at his pleasure, Grant the same lands again, and such second Grant would be valid.

A surrender of a New-Hampshire Charter to the Governor of New York, after this territory was annexed to that Province, enabled him to re-grant the same lands, and such Grant made in confirmation of the Right under the New Hampshire Charter is valid.

Such surrender may be proved by parol. The recital in such confirmation, of a surrender of the New-Hampshire Charter, is *prima facie* evidence of such surrender. A long acquiescence of the New-Hampshire proprietors under the confirmation Grant, will be construed a waiver of the Grant under New-Hampshire and a confirmation of the Grant under New-York.

EJECTMENT for lands in Windsor.

Plea—*The General Issue.*

On trial the plaintiff gave in evidence an office copy of a Charter under New-Hampshire, of the township of Windsor, in which Simeon Chamberlain was as a grantee, a deed from Chamberlain to J. Willard, dated July 16th, 1761—from Willard to Israel Curtis, 3d October, 1767—from Curtis to William Smead, 1st May, 1770—a power of attorney, Dec. 30th, 1771, from William Smead and others, proprietors under the New-Hampshire Grant, to N. Stone, for the purpose of authorising him to procure from the Governor of New-York, a confirmation of their claims in Windsor, either in their names, in the name of Stone, or in the name of any other person or persons as he should think proper.

The N. Y. Charter reciting that the N. H. Charter was surrendered, &c. was dated the 28th March, 1772, to N. Stone and twenty-one other persons, a release from the other grantees to Stone, dated the 31st March, 1772, a deed from Stone to Henry Cruger, April, 1772, of three thousand acres of land in Windsor, which was sold by agreement of the New-Hampshire proprietors to defray the expenses of the New-York Grant. The will of Henry Cruger, who is since dead, dated June 11, 1799, executed in due form, in which, his executors are empowered to sell all, or any part of his lands in America, in fee. This will had been proved in England, where the testator died, and was recorded in Windsor, Nov. 7, 1787.

Windsor, September, 1791.

Paine and Morris *vs.* Smead.

A deed from two of the executors to the lessors of the plaintiff, dated 23d April, 1787, acknowledged and recorded.

The land demanded is one hundred acres, parcel of the three thousand. A receipt from W. Smead to N. Stone, for a deed given to himself and a third person, of his, W. Smead's proportion of land in Windsor, under the New-York Grant. It was objected by the defendant's counsel, that the receipt was not proper evidence to prove a conveyance.

By the Court. It is not designed to prove a conveyance from W. Smead. Grantees under a former Charter might surrender to the King, without deed, and may be bound by acceptance of, and acquiescence under a second Grant, without deed. The receipt may be evidence of such acceptance and acquiescence.

Several witnesses proved, that there was a general acceptance and acquiescence in the New-York Grant, and by W. Smead in particular. It did not appear that W. Smead, who is since dead, did, in his life-time, make claim to the lot in question, which was divided to the Chamberlain right under New-Hampshire. The defendant claims, as heir to W. Smead, and has taken possession since his death.

It was conceded, that the defendant is son and heir to W. Smead. No evidence was produced on the part of the defendant.

Chipman, Ch. J. The right now in question, as far as relates to the operation of the Charters, must be determined agreeably to the law then in force, which was the common law of England.

The Governor of New-Hampshire, while this territory was under that jurisdiction, and after the transfer to New-York, the Governor of that province had a power to grant such lands, as were then in the right of the King. These grants were not made in the personal or even jurisdictional right of the Governors, but by royal authority, given for that purpose; and they are to be considered, in their construction and operation, as royal grants. The King was, in view of the law, the ultimate owner of all the lands within his dominions, and had the reversion in himself. An estate in fee, the highest right which a subject could have to lands, was said to be derived out of the King's right, and to be subordinate to that right.

Agreeably to this doctrine, a surrender might be made to the

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King, of a former grant. On a surrender, the King was in of his former right, and might grant again as he pleased.

The plaintiff, in this case relies, that the New-Hampshire Charter of the town of Windsor, was surrendered into the hands of the Governor of New-York for the Crown; and that the letters patent issued in consequence, by that Governor, acting for the Crown, and intended to operate by way of confirmation to the claimants under the former grant, were good and valid.

The act itself, by which the surrender was made, is not produced. The proof of a surrender of the New-Hampshire Grant, arises from the power given to Stone, the agent, from the recital contained in the letters patent of New-York, which we think is good ground of presumption, and, indeed, *prima facie* evidence of a surrender. And from the acceptance and long acquiescence of the New-Hampshire proprietors, under this grant, it should seem, that the acceptance and acquiescence alone, which must have involved almost the whole property of the land in town, would be construed a waiver of the former grant, and a confirmation of the latter.

It may be further observed, the original Charter of New-Hampshire has not been produced, and it is agreed, that it was lodged in the office of the Secretary of the Province of New-York, previous to issuing these letters patent, and that it remained in that office.

The defendant in this action stands in the place of his father, William Smead, who claimed the premises under the grant of New-Hampshire, was a proprietor of several rights, or shares, and was one of those who executed the power to Stone, to procure a confirmation from the Governor of New-York. It is in evidence, that W. Smead accepted from Stone, a title to lands in Windsor, to himself and vendees, in full for his claim under the former grants, in part, for the same lands which he formerly claimed, and in part for other lands, the benefit of which he enjoyed and left to his heirs; for it will be observed that under the New-York Grant, the whole property was vested in Stone, in trust, that he might convey to every one, according to his right, and that the division, which was made under the New-Hampshire title, was not then taken to have any legal efficacy, but served only for description. Had the question arisen between a New-York claimant and a claimant under New-Hampshire, who had disagreed to these proceedings, and refused any benefit under the second grant, it might have had another con-

sideration; at least, it would have stood in a more favourable light. The Governor of New-York, and the authority of that Province, were guilty of the highest oppression and injustice toward the New-Hampshire grantees. They held the titles derived through the Governor of New-Hampshire to be void. They were able to enforce this opinion by violent laws and by the arbitrary decisions of their Courts. In consequence of these measures, they extorted large sums of money from the New-Hampshire grantees and settlers, for what they called a confirmation. This was practised upon the proprietors of Windsor. It is insisted that the injustice of the demand ought to invalidate the New-York Grant. It is wholly a new doctrine, that the greatness, or, if you will, the enormity of the consideration given, should invalidate a grant. If it be not a legal reason, it is, certainly, a favourable argument for the grantees, in support of their grant.

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Verdict for the plaintiff.

KING Administrator of INGERSOLL *vs.* VAN GILDER.

A judgment rendered by a Justice of the Peace in another State, cannot be authenticated in the mode prescribed by the Act of Congress; a Justice of the Peace, as such, having neither a clerk, nor seal of his Court. Nor is any other proof of the record required, than the certificate of the Justice.

Such judgment is considered as a foreign judgment, is, *prima facie* evidence of the debt; but the defendant may impeach it, by shewing that it was irregularly or unjustly obtained.

THIS was an action of *assumpsit*, on a judgment recovered by Ingersoll, in his life-time, against the defendant, before a Justice of the Peace in the County of Berkshire, in Massachusetts, for the sum of £11, 12*s*. 8*d*. There had been no appearance of the defendant, and judgment was rendered on default, after an adjournment.

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Plea—*Non Assumpsit*.

In support of the action, the plaintiff's counsel offered in evidence, a copy of the judgment, certified by the Justice, before whom the judgment had been recovered.

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Harrington, for the defendant, objected to the evidence, for that the paper offered was no otherwise authenticated, than by the signature of D. Justice of the Peace—was not under seal—that the Court could not know D. to be a Justice of the Peace. To prove that D. was a Justice of the Peace, there should have been a certificate of the Governor of the State of Massachusetts.

D. Chipman, for the plaintiff. Records of judgments, rendered by Justices of the Peace, in the other States of the Union, certified by the Justice who rendered the judgment, have ever been admitted by this Court, without any other certificate or proof whatever. It has become a settled practice, and as no inconvenience has resulted from it, it ought not to be shaken.

Depositions, and the acknowledgements of deeds, have in like manner, been admitted, without any other certificate or proof, than the certificate of the magistrate taking them, and as the certificate of the magistrate has, in reason, the same weight in all these cases—the analogy of the law is preserved. It cannot be said that the act of Congress, providing for the authentication of Records, &c. embraces this case, a Justice of the Peace having no clerk or seal of his Court. There is no reason, therefore, why a practice, previously settled, should be disturbed by that act.

HALL, J. This case is not affected by the act of Congress. The certificate of the Justice, in such case has always been considered, *prima facie*, good; the copy of the record ought to be admitted.

WOODBRIDGE, J. I am of opinion, that the copy of the record offered, ought not to be admitted. The Court know nothing of the appointment of Justices of the Peace in other States, or of their jurisdiction. It would be unsafe to admit such copy, from one subscribing himself a Justice of the Peace, in another State, unless accompanied with some publick and authentick proof of his appointment and authority.

CHIPMAN, Ch J. The act of Congress has nothing to do with the case before us. In cases to which that act extends, I consider that we are bound to admit copies authenticated in the mode therein prescribed, and to allow the judgments their full effect, yet, they may be admitted on other proof of their authenticity; but, unless the record be authenticated agreeably to that act, the judgment will

be considered as having the effect of a foreign judgment only. I have doubts whether we ought to admit this copy of record, on the certificate of the Justice only; they have, however, been so admitted; the taking of depositions and the acknowledgements of deeds have ever been proved by such certificate. To require that the authority of Justices of the Peace, in other States, should be proved by the certificate of the Governor, under the seal of the State, would in all matters of small value, be equivalent to a denial of justice, by reason of the expense of obtaining such proof. I am, therefore, at present, inclined to admit the copy of record.

The counsel for the defendant then took another exception to the record, that it does not appear that any legal service was made on the defendant. It appears by the record itself, that the defendant was an inhabitant of this State, at the time the suit was commenced, and consequently was not within the jurisdiction of the Justice. It is, indeed, stated in the record, that the defendant was summoned to answer, &c. but as the service could not have been personal, and as it does not appear in what manner the process was served, no presumption can be received to support it: The record ought therefore, for this reason, to be excluded.

D. Chipman, for plaintiff. The copy which we offer, is not a copy of the writ and service merely, but a copy of the judgment in the usual form; in the same form in which judgments are entered in the higher Courts. We conceive it therefore to be *prima facie* evidence of the regularity of the judgment, and of the justice of the demand.

CHIPMAN, Ch. J. Although the defendant was an inhabitant of this State, at the time the suit was commenced, it does not render it impossible that the process was served on him personally, in the State of Massachusetts; and as the record appears regular on the face of it, the exception cannot prevail.

The cause was then argued to the Jury, by *D. Chipman*, for the plaintiff, and *Harrington* and *House* for the defendant.

CHIPMAN, Ch. J., in his charge to the Jury, observed, That the case and the law had been fairly stated to the Jury.—That the record was, *prima facie*, evidence of a debt—that the law implied

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a promise to pay it; but that considered as a foreign judgment on default, defendant might impeach it, by shewing that it was irregularly or unjustly obtained. 1 Doug. Walker et al. vs. Witter.

It was objected on the part of the defendant, that such judgment might, on a mere groundless pretence, at any time be obtained abroad against citizens of this State, and that it would not be possible to impeach it, as it could be done only by proving a negative. But this is incorrect; it would be in the power of the defendant in such case, to produce evidence which would raise a presumption that the plaintiff's demand was groundless, which would put the plaintiff to prove his demand, *de novo*, and the trial would then be had, and the case decided as though no judgment had been previously rendered. The defendant has in this case attempted no such defence.

Verdict for the plaintiff.

Smith *vs.* Joiner and Moore.

A Sheriff or other officer has no legal authority to command assistance to keep a prisoner, wantonly and from mere caprice.

The acts of a Deputy Sheriff, are, in law, the acts of the Sheriff; and he alone can sue or be sued for any thing done in the execution of his office.

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THIS was an action on the case. The declaration stated, in substance, that the plaintiff, as Sheriff's Deputy, at ———, in the County of Chittenden, on the 6th day of Nov. 1792, arrested one B. on sundry executions, &c. and then and there required the defendants to keep the said B. for the space of twenty-four hours.—That the defendants neglected to keep the said B., and suffered him to escape.—That suits had been brought against him for the escape of the said B., and he had been compelled to pay, &c.

Plea—*Not guilty*.

D. Chipman and *Fay*, for the plaintiff, produced in evidence the deposition of Charles Dewey, who swore that on the 6th day of November, 1792, at ———, plaintiff arrested the said B. on several executions, one of which, was in favour of John Carpenter, and

delivered B. to the defendants, to keep until ten o'clock the next morning, and went away.—That after plaintiff had gone, the defendants and B. went to their several homes.—That the defendants paid no regard to their obligation to keep B., nor was B. delivered or surrendered to the plaintiff.

Fay, then offered in evidence the execution in favour of Carpenter against B.

Miller, for defendant, objected to the evidence on the ground that plaintiff must first shew that he was a legal Deputy Sheriff, and that he had returned the writ.

By the Court. It is necessary for the plaintiff to shew that he was a legal Sheriff's Deputy, by producing his warrant from the Sheriff of the County; but it is not necessary to shew that he had returned the writ.

Fay, for plaintiff, stated that on a former trial of this cause, the defendant's counsel conceded that the plaintiff was legal Sheriff's Deputy—that the present exception, therefore, operated a surprise.

On an intimation from the Court that the cause would be continued, the defendant's counsel waived their objection.

The execution in favour of Carpenter was then read.—It was for the sum of £13, 2*s*. 3*d*.

Stanton being called as a witness by plaintiff, testified that the plaintiff had paid a part of the amount of the execution to him as Carpenter's attorney, and said that he would retain the remainder on account of a debt due from Carpenter to him. On being cross examined, he said, that plaintiff told him, that he had collected the whole amount of the execution of B., but nothing was said respecting his fees, and that B. had long since absconded.

CHIPMAN, Ch. J., charged the Jury as follows:—This is a question of strict right.—The defendants received no consideration for keeping the prisoner, nor did they enter into any special agreement to keep him. An officer has a right to command assistance, when necessary, to the execution of the duties of his office; but as has been well observed, not wantonly, nor for his own private convenience.

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It does not appear, in this case, why the plaintiff required the defendants to keep the prisoner; but it must be taken to have been necessary and proper as nothing appears to the contrary. It appears in evidence, that the plaintiff directed the defendants to keep the prisoner until the next morning, and went away.—That soon after, the defendants and the prisoner went, each to his own home; and that afterwards the plaintiff collected of B. the amount of the execution in favour of Carpenter, the only execution which has been produced in evidence. It does not appear, that the plaintiff ever returned, to seek after the prisoner, or to receive him of the defendants.

Were there nothing more in the case, I should think that the plaintiff was not entitled to recover. It does not appear that he resorted to the defendants at the time, to receive the prisoner, or demand satisfaction; but rather that he proceeded to execute his writ, and collected his money of B.

But there is something further;—the acts of a Sheriff's Deputy, are, in law, the acts of the Sheriff; and he alone can sue or be sued, for any matter relating to the execution of the duties of his office merely: the Deputy may sue, or be sued, as a private individual, for personal torts, which may have been committed, while in the execution of the duties of his office: in such case, he need not name himself, or be named Sheriff's Deputy. It has been objected that the Deputy is answerable to the Sheriff, who might refuse to prosecute in his own name; but, if in such case, the Sheriff should refuse to prosecute, or suffer the Deputy to prosecute in his name, I apprehend it would be a sufficient excuse as between him and the Sheriff.

As this matter is apparent on the face of the declaration, it should have been taken advantage of by demurrer, but is fatal under the general issue.

Verdict for the defendants.

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CAMPBELL *vs.* HYDE.

The condition of a bond, that H shall within five months from date, establish B. in possession of the land described, will admit of different constructions, and may be explained by parol proof.

Evidence of a performance of the condition, will not support a plea of accord and satisfaction.

Great latitude is, in many cases allowed, in the admission of evidence, under the general issue; but in cases of special pleading, the parties are strictly confined to the facts put in issue.—Therefore, if plaintiff traverse a plea in bar, he cannot give in evidence, matter in avoidance of the plea, and can avail himself of such matter, by a replication only.

THIS was an action of debt on a bond with the following condition:—"Whereas the said Hyde has sold and conveyed to the said Campbell, the Right of D. Hoyt, in the two Heroes, if the said Hyde, shall within five months from date, put and establish the said Campbell, in possession of said Right, the said bond to be void, &c."

The defendant pleaded in bar, that after making the said writing obligatory, to wit, on ———, it was agreed, by and between the said Campbell and the said Hyde, that A. Gordon, collector of a certain proprietors' tax, having sold said Right to said Hyde, at publick vendue, and not having made any deed thereof to said Hyde, he, the said Hyde, should draw an order on the said Gordon, to make a deed of the same Right, to the said Campbell, and if the said Gordon should make a deed thereof, accordingly, the said Campbell should accept it, in full satisfaction of said bond and condition—that said Hyde, accordingly drew an order on said Gordon, who executed and delivered to said Campbell a deed of said Right, which he accepted in full satisfaction of said bond, which plea was traversed by the plaintiff.

On a trial by Jury, the defendant to prove said issue on his part, produced the following evidence:

E. Allen, proprietor's clerk of the two Heroes, testified, that sometime after the date of said bond, Campbell came to his house, and inquired whether Hyde had bid off the Right of D. Hoyt in the two Heroes—that he informed Campbell that he had. Campbell then said that he had bought the Right of Hyde, and had agreed to take a deed of Gordon, the collector, that Hyde was poor, but Gor-

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don had bottom. Campbell afterwards told the witness, that he had taken a deed of Gordon.

Smith testified, that Campbell told him, he had taken a deed of the same from Gordon.—The witness told Campbell that it was a collecter's deed, and if the title should fail, perhaps he would recover of Gordon no more than the consideration of the deed, which was a small sum.—Campbell replied, if that be the case, I will keep my bond against Hyde; if I am not safe one way, I will be another.

Gordon testified, that after he had sold the Right of D. Hoyt to Hyde, at vendue, which he did as proprietor's collector, and after the time of redemption had expired, Campbell brought him an order from Hyde, to convey the Right to him, Campbell.—That he executed and delivered the deed accordingly.—That he never saw the bond, but at the time he gave the deed.—There was some conversation about the bond—he understood that Campbell was to give up the bond.—Hyde afterwards called on him, and inquired if Campbell had left the bond to be given up—he informed him that he had not.

J. Hyde, jr. testified that he had a knowledge of the bargain between his father and Campbell.—That in the year 1793, he had been to survey a piece of land for Campbell.—That on his return, Campbell set him across a bay of the Lake in a canoe—while on the water, he had a conversation with Campbell respecting the bond.—Campbell said the business was settled as it respected his father, and the bond ought to be given up; but that he still held it, as he supposed it might be of some use to him in a dispute between him and Gordon, for which reason he kept it.

The plaintiff's counsel then stated, that it was agreed between Campbell and Hyde, on the purchase in question, that said Right should be conveyed by what is called a transfer.—That Gordon, the collector, should, by virtue of an order for that purpose, give a deed to Campbell, instead of Hyde, the original bidder.—That the order was drawn, and at the same time the bond was executed, for the purpose of securing to Campbell a good title in that mode of conveyance, so that the order was not given in satisfaction of the bond, but the bond was given for the purpose of securing the event of the order on Gordon, and the title to be thence derived. This they contended the words of the condition would warrant:—" After

said Hyde shall put & establish the said Campbell in possession,"&c.

On this point, Lathrop testified that he was a witness to the bond—that he thought the order for a transfer, was drawn at the same time with the bond—thought that something was said concerning the propriety of doing the business in that way; but of this he could not be positive.

Lloyd testified that he was, with others, on an arbitration between Campbell and Hyde—that Campbell brought forward the bond, to be arbitrated with other matters—that Hyde objected, and said the title to the Right had never been disputed.

Pearl testified, that after the action of ejectment against Campbell, for the Right of D. Hoyt had been tried, or was on trial, he heard Hyde tell Campbell that his title to the right was good—that if it was not, he would make it good. This he said was in consequence of its being suggested, that Hyde had received the redemption money of the original owner, by which the sale had been vacated before the deed was given to Campbell.

Comstock testified, that after a recovery had against Campbell, of the Right of D. Hoyt, he, on request of Campbell, conversed with Hyde concerning a settlement. Hyde said that Campbell had not used him well in that business, and that he ought not to make him any compensation, but that he would, if witness would take some land in Hyde Park for that purpose.

Campbell, the father, testified that he called on Hyde for his son—told him that the title to the Hoyt Right was not good. Hyde said he would call on his son, and make out a chain, as witness understood it, by taking a deed from Gordon to himself, and then executing a deed to his son.

The counsel for plaintiff then stated, that the defendant before he gave the order on Gordon, had received the redemption for his bid on the Hoyt Right, and given his receipt for the same, while it was, by law, redeemable, by which the deed from Gordon had been defeated; consequently, the whole defence now set up was fraudulent and ought not to avail the defendant, and on this point offered to produce evidence.

House, for defendant, objected that this was not a point in issue.

By the Court. The issue in this case is taken on the facts stated

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in the defendant's plea in bar. In replying to a plea in bar, the plaintiff may traverse the facts, on which the defendant relies, or, he may confess the facts, and avoid them by new matter. We have no doubt, that if the plaintiff had replied the matter now stated, it would, in point of law, have been a good avoidance of the matter alleged in bar. In many cases, greater latitude is allowed, on the general issue; but when parties go into special pleadings, the rule is universal, that they shall be confined strictly to the facts put in issue. The fact now offered to be proved, is not within the issue, and ought not to be admitted.

The cause was argued to the Jury by *House* and *Keyes* for defendant, and *D. Chipman* and *Harrington* for plaintiff.

CHIPMAN, Ch. J., after stating the pleadings and evidence to the Jury, gave the following charge:—The only point for you to determine, is, whether the order on Gordon, and the deed from Gordon to Campbell, were, by agreement between the plaintiff and defendant, given and received in satisfaction of the bond, or, in other words, whether the plaintiff agreed to accept of that deed, in lieu of, and as equivalent to, being put and established in possession of the Right as therein stipulated. We have it in evidence, that the defendant, having purchased the Right of land of Gordon, a collector, and having taken no deed of the same, drew an order on Gordon, to convey the Right to the plaintiff. The plaintiff took the order and obtained the deed accordingly. But the words of the agreement, on which the order was given, and the precise time when the agreement was made, whether at the time when the bond was executed, or at a subsequent time, does not appear in proof. The substance and intent of the agreement, are to be collected from the subsequent conversation of the parties and the acknowledgements of the plaintiff at different times. The evidence, though not contradictory in terms, yet tends to different conclusions. It is your province to weigh the evidence, and thence to ascertain the intention of the parties in this transaction. It has been well observed in the argument, that could we learn the true meaning of the parties, from their expressions, in the condition of the bond, it would enable us, to weigh and apply the evidence with a great degree of certainty. The operative words in the condition of the bond, are, "Whereas the said Hyde has sold

and conveyed to the said Campbell, the original Right of D. Hoyt, in the two Heroes, if the said Hyde, shall within five months from date, put and establish the said Campbell in possession of said Right, then this obligation to be void." This condition, with or without reference to the order on Gordon, may receive different constructions. 1st. It may be considered as intended to bind the defendant, to make out a good title in possession, within the time stipulated, and the order as given on an after agreement. In this view of the transaction, the case will turn wholly on the weight of the evidence to prove the subsequent agreement. The weight of the evidence here seems to be with the defendant; but of this, you are the sole judges. 2d. The order and agreement, that a deed should be received *from* Gordon, may be considered as the conveyance mentioned *in* the condition of the bond, (for it is clear that no conveyance was made out at that time) and the bond as intended to secure the execution of such a deed and its final validity, in operation.

If this be the true intention and explanation of the whole transaction, the defendant has mistaken his defence. He should have pleaded performance, instead of his present plea, which is in the nature of accord with satisfaction, and directed his proof to that point. But this construction seems to be wholly opposed, by the stipulation in the condition, that the defendant should fulfil, within five months from the date of the bond. As the defendant was bound to discharge himself, by fulfilling, on his part, within five months, it could not have been in the contemplation of the parties, that the bond should stand as a security for the validity of the conveyance, when made in the way proposed; for this point might not be determined for years, certainly not within five months: but that if such conveyance should fail in securing the title, it was, doubtless, to be left to the common remedy. This seems to have been the understanding of the plaintiff, in his conversation with the witnesses, Allen and Smith. He represented to them, that it would be more safe for him to take a conveyance from Gordon, than from the defendant, because Gordon, as he said, had bottom, that is, he would be able to make good the damages, in case the title should fail, which the defendant might not be able to do; from which it appears, that the plaintiff's sole reliance on the bond, was, to secure to himself a deed or conveyance of the Right in possession, and expected to take his remedy on the instrument of conveyance, if the title should final-

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ly fail. 3d. If we take it that the parties, in drawing the bond, did not distinguish clearly, (as is very evident) between a deed of conveyance, and an agreement for a sale, and that the bond was intended only to secure, that Gordon should give a deed of the premises, to the plaintiff. The substance of this issue is with the defendant. The validity of the deed in its operation, and the remedy upon it, on failure, are out of the present question.

If, on the whole, you should be of opinion that the order was given, on an after agreement, in lieu of what was stipulated in the condition of the bond, or, if you should be of opinion that the bond was only intended to secure that Gordon should give a deed of the premises, you will find for the defendant, on his plea in bar.

But, if on the other hand, from an attentive consideration of the bond, condition, and the whole transaction, as it appears in evidence, you should be of opinion that the bond was intended to secure the execution of the deed from Gordon, and also, its final validity, you will find for the plaintiff.

The Jury found a verdict, that the plaintiff ought to be barred.

The plaintiff's counsel, after verdict, moved for a rule on the defendant, to shew cause why a new trial should not be granted.

The ground suggested for granting a new trial, was, "that J. Hyde, jr. who testified in the cause, was a material witness for the defendant, and without whose testimony, the Jury would not have found a verdict for the defendant, ought to have no credit.—That since the trial, the plaintiff had discovered new evidence, by which he should be able to prove, that the plaintiff was not with the witness, at the time when he testified the conversation between them took place."

Marsh opposed granting the rule. *D. Chipman* and *Harrington* were heard in support of it.

CHIPMAN, Ch. J. The Court are unanimously of opinion, that the ground stated in the motion, does not come within any of the reasons for which new trials have been granted. It is said that J. Hyde, jr. was a material witness for the plaintiff, and without whose testimony, the Jury would not have found a verdict for the defend-

ant, and that no credit ought to have been given to his testimony.— That since the trial, the plaintiff had discovered new evidence, by which he should be able to prove an *alibi* of the witness, that the plaintiff was not with the witness at the time when the witness stated the conversation to have taken place. This, give it its full weight, goes only to discredit the witness, and that in a matter merely circumstantial. It may have had some weight as a collateral circumstance, in granting a new trial, but has never been considered, by itself, as a sufficient ground for granting a new trial. I find it is agreed, that the witness did survey for the plaintiff, at the time mentioned in his testimony, and that on his return home, he was by some one conveyed in a canoe. But, it is said it can be proved, that the plaintiff was not with the witness in the canoe at that time. It is more than three years, since this conversation, related by the witness, is said to have taken place. If the witness has mistook, or misremembered in that particular, at this distance of time, it would not go to contradict his testimony. It would be a circumstance, only, for the consideration of the Jury, in weighing his testimony. The Jury might have wholly disbelieved his testimony, on proof of that mistake, or, they might have thought that the conversation was had, as related in substance, though different a few minutes or a few rods in point of time or place. Besides, it cannot be conceived that the verdict turned on the testimony of this witness. The three witnesses who preceded, and whose veracity has not been questioned, testified to a conversation of the plaintiff, and to facts which must have had much more weight with the Jury.

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Under all the circumstances, we are clear, that a new trial ought not to be granted.

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WILCOX *vs.* SHERWIN.

In an action of Trespass against a Town or Parish Collector, the defendant may, under the general issue, give in evidence his authority to take the property in question, in justification; but cannot give in evidence a release of the trespass, or any other matter which does not shew the taking lawful.

THIS was an action of trespass, in which the plaintiff declared, that on the 20th of March, 1795, at Charlotte, the defendant with force, &c. took and drove away, out of the possession of the plaintiff, a certain heifer the property of the plaintiff, &c.

Plea—*Not guilty.*

The defendant's counsel admitted the facts as stated in the declaration, and stated, as matter of justification, which they should give in evidence, that there were two taxes granted by the town of Charlotte, for the support of a minister of the Gospel in that town—one tax for the year 1793, the other for the year 1794.—That the defendant was legally chosen collector of those taxes.—That the taxes were severally assessed, and the several assessments or rate bills, with a legal warrant on each, were delivered to him, for the purpose of collecting those taxes.—That the plaintiff was an inhabitant of Charlotte, and legally assessed in their rate bills; and because the plaintiff refused to pay the taxes so assessed upon him, the defendant, by virtue of said warrants, had distrained the said heifer, and sold her, as the law in such cases directs.

D. Chipman and *Marsh*, for the plaintiffs, objected that matter of justification was not, in this action, admissible under the general issue. In support of the objection it was argued, that this was an action of trespass, and the motion on the part of the defendant, was, to be admitted to give matter of justification in evidence under the general issue.—That it would be necessary, in attending to the question, to inquire, what had been the general practice at common law, and to examine what convenience or inconvenience might follow a deviation from what is apprehended to be the established law in this case.

It is said to be an established rule of the common law, that in actions of trespass, every matter of justification must be specially pleaded, and cannot be given in evidence under the plea of not

guilty.—This doctrine is clearly laid down in Bac. Ab. 218, title, trespass, and is to be found in all the books.

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Indeed the rule extends to every independent matter, which goes, either to justify or avoid the facts alledged in the declaration; and the reason given for the rule is a sound one, that the matter may be first shewn to the Court, that they may determine whether it be a legal defence in the action. In this way, matters of law come separately, to be determined by the Court, the proper judges of the law; and matters of fact go to the Jury, unembarrassed with intricate questions of law.

It is true, that in England, by the statute of James I. the rule was dispensed with, in favour of certain inferior officers, who, by that statute, were to plead the general issue in actions brought against them, for any thing done in the execution of their office, and give the special matter of justification in evidence. That a statute was necessary to introduce a partial relaxation of the rule, shews how extensive and how firmly settled was the rule of the common law in this case. In Great Britain, the inconvenience of relaxing the rule, may be much less than with us. Their trials are mostly at Nisi Prius, and the Judges have frequent opportunities, on motions for new trials, of reconsidering and correcting their decisions on the admission of evidence. With us it is different. Every question relative to the admission of evidence must be decided while the Jury are on their seats, and the Court have rarely an opportunity to consider and correct their decisions, thus made on the spur of the occasion. This difficulty will be increased, if matters which may and ought to be pleaded specially, should be permitted to be given in evidence under the general issue, as it will add greatly to the number of decisions which must be made by the Court at the moment of trial.

It must also be a surprise upon the plaintiff and his counsel. It will frequently happen that they will have no notice of the intended defence, until the evidence is produced in Court, the plaintiff can have no opportunity of confronting witnesses, and the counsel will be called to argue, and the Judges to decide upon some of the most intricate questions of law, without time for deliberate investigation. Beside, if the Judges should decide the matter of defence offered in evidence to be a sufficient justification in point of law, yet the Jury

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may ultimately control in points of law, as well as in matters of fact. On the whole, it was contended, that to continue the common law practice, relative to the pleading of any matter of justification, specially, will have a tendency to bring matters with less perplexity before the Jury, and to establish & preserve an uniformity of decisions with the Court, in matters of mere legal import.

For the defendant, it was contended, that the practice of giving the special matter of justification in evidence under the general issue, has prevailed. It has been, however, admitted, probably by a tacit consent, as it is not known that there have been any decisions on the point in this Court. The case of Spaulding against Marsh, was of the same nature as the present action. In that case, the general issue was pleaded, and the defendant gave in evidence, a justification, precisely similar to the one now offered. It is true, no objection was made, either in the County or Supreme Court. Indeed, very few instances of special pleading, in actions of trespass, are to be found in our Courts. Yet defendants have frequently given special matter of justification in evidence under the general issue. By admitting matters of this kind to be given in evidence, the perplexity of special pleading will be avoided, and that chicanery which has been too often practised, to lead the Court and Jury from the true merits of the case. It is apprehended that what will be good and sufficient matter of justification in an action of trespass, is so clearly settled in the books, that the Court can rarely be at a loss in deciding. If this be the case, the matters of fact will come simply before the Jury, for the Court will not allow matters insufficient in point of law to go to the Jury in evidence. The Jury may, indeed, when the whole matter is before them, undertake to decide on its legal sufficiency, in opposition to the Court; but this is a disadvantage to the defendant only, which by pleading, he may avoid at his option. It is conceived, that this question does not relate so much to the principles of justice, as to the modes of obtaining it. If the mode contended for be adopted, it will not, of course, extend to all actions of trespass, but to such actions only, as may be brought against collectors of taxes, or at most, to those which may be brought against officers for any thing done in the execution of their office. In these cases, the officer will always be known, and it will likewise be known under what authority he claims to act. That he should

justify under that authority cannot be unexpected; there will, therefore, be no danger of surprise in the case.

It was replied by defendant's counsel, It is true that the principles of justice are not concerned in the present question, for it relates only to the fairness and convenience of the mode of obtaining justice. But it is of great consequence in the administration of justice, that such mode be adopted as shall give each party a fair opportunity to exhibit to the Court and Jury a true statement of his case, both as to law and fact. It is conceived that the few instances which have occurred of giving special matter of justification in evidence under the general issue, have been permitted by consent. In such case there could be no surprise on the plaintiff; but this does not prove that he would not frequently be taken by surprise, for want of a knowledge of his opponent's intended defence. It is apprehended that the Court will in this case, go upon a general rule, and not upon particular exceptions in favour of collectors. For, what reason can there be why one class of people should be privileged above another? Besides, the County Courts will follow the practice adopted by this Court, and it is easy to foresee, that to call Judges of those Courts, frequently to decide, as it were, extempore, on some of the most intricate questions of law, will lay them under serious embarrassments, and will prove very detrimental to a steady and uniform administration of justice.

Chipman, Ch. J., delivered the opinion of the Court. This is an action of trespass, for taking with force and arms from the plaintiff, a certain heifer the property of the plaintiff. The defendant has pleaded the general issue, and under this plea, offers to justify the taking in evidence to the Jury, by virtue of a legal authority, as collector of a town or parish tax. To this, objection is made by the plaintiff's counsel, on two grounds. 1st, That it is an established rule of the common law, that in actions of trespass, no matter of justification shall be given in evidence under the general issue, but that it shall be pleaded specially. 2d, That from a relaxation of the rule, great inconvenience will arise, both to the Judges and to the parties.

The rule of the common law is, certainly, as it has been stated by the plaintiff's counsel. In England the rule is extended so far, that in actions of trespass, the facts charged in the declaration can

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neither be justified nor avoided by evidence under the general issue. This, of course, introduces a multiplicity of special pleas, so that the science of special pleading has become a science of the first importance in the English Courts of common law. I conceive, however, that it is a matter of practice, not of principle—a matter of form rather than substance. It is not founded on those principles of the common law, which are the principles of common justice, and agreeable to which, decisions of right are made by Courts between man and man. These principles are universally binding in all cases which come within them; and to these, Courts are at all times bound to adhere. The rule in question is a rule of mode, and does not directly involve the property of any individual in the community. It is one of those rules which are subject to the sound discretion of the Court, and may by them be modified and altered in such manner as they think will most conduce to the attainment of justice.

It is true that rules of practice, though they relate principally to modes and forms, ought not to be subjected to frequent alterations, nor ought alterations to be made upon slight grounds. But where there exist substantial reasons for it, the Court have both the power and the right to make the necessary alterations. The English Courts, at least in former times, adhered to modes and forms with a degree of obstinacy, and in some instances to the exclusion of the common principles of justice.

Before the statute of James I. the rule as contended for by the plaintiff's counsel, was general. By that statute it was first enacted that in actions brought against certain officers, therein named, and their assistants, for any act done in their respective offices, the defendant might plead the general issue, and give in evidence, any special matter, which, had it been pleaded, would have been sufficient to have discharged the defendant of the trespass. Inconveniences had doubtless been experienced, in a rigid adherence to the rule now under consideration, for the remedy of which this statute was made. It was made in favour of certain officers only, who were frequently exposed to vexatious suits for acts done in the execution of their several offices. The expense, delay and vexation of pleading specially a justification in every such case, must have been extremely burdensome. Besides, so strict were the rules of pleading held, both as to matter of form and substance, that few cases could

come to trial on their real merits. For this reason it was in the power of a few litigious persons to ruin an officer in publick trust, though acting with the utmost integrity and the fullest knowledge of his duty.

After a long experience in practice upon this act, their Legislature have, in numerous acts, extended the benefit to persons making entry and distress for rents and services, and to almost every person exercising any inferior office or trust of a public nature. This is a strong evidence of the benefit there derived from the alteration in the law, and that those inconveniences which might have been apprehended from the alteration did not follow in practice. These acts do not extend to Sheriffs or to any officers serving process issuing out of the Superior Courts, or what are called the King's writs. One reason was, that it is less troublesome to plead a justification in the cases last mentioned, for he who had the King's writ had only to shew a good writ, with his return as a sufficient justification; but officers acting under a derivative authority, are holden to shew the authority by virtue of which they acted, and all the proceedings under it to be good and legal in every particular. Besides, the power and authority of the Sheriffs rendered them less liable to vexatious suits.

As to the second argument drawn from the inconveniences, which, it is supposed will attend a relaxation of the rule in this case, the statute of James and its extension by numerous succeeding statutes, will take off much of its weight. It is said that the proposed relaxation of the rule in this case, will often operate as a surprise on the plaintiff—that he will have no means of knowing what defence will be set up, until the very moment of trial, so that he must often come unprepared to meet the defendant on the ground which he has taken without notice.

We do not extend the present question to a subsequent matter, as a release by which the defendant may avoid the consequences of the trespass charged by the plaintiff. We confine it to matters existing at the time of the trespass charged, and which, if established, will prove that the defendant has done no wrong, but acted legally and right by virtue of a good authority. Under this limitation, the above position, that the proposed relaxation of the ancient rule, will operate to take the plaintiff by surprise, will be found destitute of

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foundation. These appointments are not made, nor is the authority under which the officers claim to act, conferred in secret—they are matters of sufficient notoriety. Actions like the present are always brought to try the validity of the authority claimed, or, to recover damages for some excess or abuse in the exercise of that authority. It would rather be a matter of surprise to the plaintiff, if the defendant should not attempt to justify. The action, I may say, is always brought under this expectation, and the plaintiff prepares himself accordingly.

But, it is said that the plea of not guilty, goes only to a denial of the facts charged in the declaration, and therefore, ought to put the plaintiff to the proof of those facts only. I know it has been held, that the plea of not guilty amounts to a denial only of the facts, and is the only reason given why matters of justification should not be given in evidence under such plea. But, a moment's attention will discover this to be a mere technical construction, and much narrower than the expression imports in the common use of language. The plain and obvious meaning is, that the defendant has done no wrong in the case. It may be that he has done the acts, or that he has done them in the manner charged; but if he had a good and legal authority, and acted within the limits of that authority, and indeed was bound in duty to do the acts which he did, it is absurd to say that he is in any sense guilty; for where there is no wrong there can be no guilt. We have only to decide, that we will understand things in Courts of law, as they are understood by the rest of the world; and the danger of a surprise in such case will, at once, vanish. A release, accord, and other matters subsequent to the trespass, which do not go to modify the facts charged, but take away the remedy only, seem to have a different consideration.

Why should there be more difficulty upon this point, in the action of trespass, than in the action of trover? Trover will lie in every case, where trespass will lie, for goods tortiously taken, with or without pretence of authority.—Indeed it is now the action most in use for trying the right to personal property, taken under pretence of authority, especially if the object is only to recover damages for the goods. In trover the general issue is usually pleaded, and the special matter given in evidence. Indeed, there is no matter of justification which the defendant, in trover, may not give in evi-

dence under the general issue, and it has never been thought a ground of complaint: on the contrary, for this very reason, the action has been encouraged, and has come into very general use in cases like the present. From the nature of the thing, there is as much danger of surprise in one case as the other—the difference in this respect is not in the nature of the action, but in the rules which have been adopted for the admission of evidence.

It is not apprehended that the Court will find themselves embarrassed in deciding, on trial, what matters are admissible in evidence, as good and legal justification, any more in the action of trespass, than in the action of trover. These are matters, which, as to the substance, have long been fully ascertained and settled. Indeed, it will be found that the principal difficulties which have occurred, have arisen from the great nicity required in pleading, by which justice is often entangled in a net of forms. As it will be in the power, so it will be the duty of the Court, if the defendant should offer to prove any matter, which, if established, would be improper, or insufficient to justify him in the action, to reject the evidence and not suffer it to go to the Jury.

It has been observed, that the practice of giving matter of justification in evidence, under the general issue, in actions of trespass, either from the inattention of the parties, or, from an apprehension that the law was so, has already prevailed in some degree. That the practice has prevailed in some degree, is true. The history of it is this :—There was a law of this State passed in February, 1779, copied from a law in Connecticut, by which the defendant, in any action, was permitted to give in evidence, under the general issue, any special matter proper to his defence or justification, excepting a release, discharge, or other matter whereby the defendant was saved in the action by the act of the plaintiff. The practice was adopted under this law, while it continued in force, which was until march, 1787, when on a revision of the laws, it was repealed. After the repeal, the practice which had obtained under the statute, was in some instances continued without any objection, and without any decisions on the point, within my knowledge. This was the case in Spaulding against Marsh, in which I was of counsel for the plaintiff. The law was not, however, generally considered to be so; for sometimes the parties made particular agree-

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ments, that any special matter might be given in evidence under the general issue..

Upon these considerations, the Court are unanimous in the opinion, that the defendant in this case be admitted to give in evidence to the Jury, the matters which his counsel have stated, in his justification.

The defendant's counsel, as before, admitted the taking of the property, and again stated their defence. That the defendant, who was and is an inhabitant of the town of Charlotte, was legally appointed a collector of the town for the years 1794 & 95.—That before the taking of the property mentioned in the declaration, the selectmen of Charlottee committed to him two rates to collect—one for the year 1794, the other for the year 1795, for the purpose of paying the salary due from the town to Mr. Gillet, their settled minister, for those two years.—That the rates were contained in two rate-bills made out by the selectmen of Charlotte.—That a warrant was annexed to the two rate-bills, signed by ——— Justice of the Peace, directing him the defendant, as collector, to collect the same.—That the plaintiff was assessed in each of those rate-bills, and because he refused to pay said rates, he the defendant, by virtue of said warrants, took the said heifer as the property of the plaintiff, and sold the same as the law in such cases directs, which they relied on as a sufficient defence, if proved.

The counsel for the plaintiff objected, and insisted that to entitle the defendant to give the warrant and rate-bills in evidence, he must first shew that the taxes mentioned were legally granted by the town of Charlotte.—That for this purpose it would be necessary to go into the settlement of the minister by the town, that it might be seen whether every thing had been done agreeably to the statute in such case provided.—That all this would have been necessary in pleading, and although the defendant is allowed to justify without pleading specially, yet the same matters in substance, which would have been necessary in pleading, will be necessary in proof, under the general issue.—That they understood that the decision of the Court relative to the mode of practice in this case, did not affect the subject matter of the justification.—That the defendant now offered to justify under an authority, and to carry into execution an act

of a corporation, in doing which, it would be necessary, according to well known and established principles of law, to shew that the whole was legally right. 1 Esp. 103—4—5.

The defendant's counsel said in reply, that a collector is a known officer—he is bound to obey his warrant.—That there is no reason why a legal warrant should not be as sufficient to justify a collector of taxes, as a legal writ to justify a Sheriff or other officer serving legal process. The treasurer's warrant would be sufficient to justify a collector of State taxes. A collector of a corporation, has by statute the same powers, the same duties to perform, and of course the same indemnity, and could not be held liable for the acts of the corporation or even of the assessors: if either of these have done wrong, the action should be brought against one or the other accordingly.

The counsel for plaintiff replied—This differs from civil process issued by a Court or magistrate having competent jurisdiction. In that case, the writ issues under a general and known law of the State, from a known authority. The officer to whom it is directed, is bound to obey the precept, and shall therefore be justified by it. But the acts of a corporation are known to their own members only—to others, they are private acts, and to be known, must be proved. This case differs likewise from that of a collector of State taxes.—The Treasurer issues his warrant for the collection of a tax, under publick and known laws, of which the Court are *ex officio* bound to take notice. A collector of a state tax, therefore, need not shew the law which is among the publick acts of the State. This warrant is sufficient for him.

Hall, J. In this case the warrant and rate-bill, or bill of assessment, are sufficient to justify the collector. I can see no distinction between this case and that of an officer serving civil process, or a acollector of State taxes with a Treasurer's warrant. A town officer is an officer known in law. A Justice of the Peace is empowered to issue such warrant for the collection of town taxes; and the collector is, by law, compelled to collect the rate committed to him with the warrant, and is made accountable for it without any exception. It would be very hard, as he is not allowed to judge of the legality, that he should be in any way answerable for any wrong

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which either the town, or the selectmen, or whoever were the assessors should have committed. If the town proceeded illegally in granting a tax, or if the selectmen have made an illegal assessment on any one, an action, if brought, should be against the town or selectmen as the case may be, and not against the collector.

I am therefore of opinion, that it is a sufficient justification for the collector to shew a warrant and a rate-bill apparently legal.

CHIPMAN, Ch. J. A warrant and rate-bill are not sufficient to justify a collector of town taxes. There appears to be a clear and sensible distinction between the case of a town collector, and that of an officer serving civil process, issued by authority of competent jurisdiction, or of a collector of State taxes under a warrant from the Treasurer of the State. In those cases, no question can arise, except whether the party applying have complied with what the law makes a prerequisite, and of this, the authority signing is the Judge. Nothing depends on any preceding act of any man, or body of men to lay a foundation for its legality. An officer serving civil process is merely executive. If he receive a writ apparently legal, & within the jurisdiction of the authority signing it, he is bound to obey its precept. If there be any illegality not apparent on the face of the writ, the plaintiff and the authority issuing the same, may be liable, not the officer serving it.

When a state tax is granted, it is granted by a publick act of legislation, and the Treasurer is empowered by a publick law of the State, to issue his warrant for the collection of such tax, to the first Constables of the several towns, who, by law, are made collectors of State taxes in their respective towns. The grant of the tax, the power of the Treasurer to issue warrants, and the powers of the Constables, as collectors of State taxes, are by publick laws, of which the Courts are bound to take notice *ex officio*. A collector of a State tax, therefore, need only to shew his appointment and the Treasurer's warrant in his justification, should he be sued for executing such warrant. All the rest is matter of law, not of evidence. But, should the Treasurer issue his warrant to the first Constable of a town, directing him to collect a tax of the inhabitants of the town, when no such tax had been granted by the Legislature, and an action should be brought against the Constable for taking property thereon, his warrant would be no justification.

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The Court are equally bound, *ex officio*, to take notice that there is no law granting the tax. The power of the Treasurer to issue warrants for the collection of taxes, is given only in cases of taxes granted by law; and it can never be admitted, that any person is ignorant of the existence of the publick acts of the Legislature of the State.

The corporate powers of towns are certainly of publick notoriety in the laws of the State; but the corporate acts of any town, are to all but the inhabitants, who are members of the corporation, private acts—they are unknown to others. Courts can know nothing of them but by proof. They are not matters of law, but of fact—the effect of which is to be determined upon legal principles.

The power of a town, as a corporation, is not general; it is limited both as to the subject matter and the mode of exercising it. For instance, should the inhabitants presume to vote a tax to raise a sum of money, for the purpose of setting up a manufactory, the subject not being within the powers given by law to towns, the vote would be illegal and void.

The mode of calling town meetings is prescribed by law.—Should the selectmen, therefore, instead of setting up a notification for calling a town meeting, as the law directs, only order a proclamation for that purpose to be made, at some publick place, or should they warn the meeting to be holden within three days only, after setting up a notification, and upon such notification should hold a meeting, in either case every thing done at such meeting would be illegal and void. It would no more bind the inhabitants, nor have any more the force of a corporate act, than the agreement of half a dozen individuals, accidentally met at a private house. For these reasons, the doings of a town ought to be shewn by any person who justifies by an authority in any way derived from them.

The power to issue warrants for the collection of town taxes, is not incidental to the office of Justice of the Peace; it is given by statute, and is given only in cases where taxes have been granted. The power might as well have been given to the town treasurer, and perhaps with more propriety. The Justice is, in this case, a mere instrument. He ought, doubtless in every case, before he issues a warrant for the collection of a tax, to be satisfied that a vote has been passed granting such tax. Should he issue a warrant in a

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case where no tax had been voted, he would certainly be liable for the consequences. But, if a tax has been voted, I apprehend he is not bound to judge of the legality of the vote, and would not in any way be accountable for its legality.

The town collector could no more justify the collecting a tax by virtue of a warrant from a Justice of the Peace, when the town had granted no such tax, than a Constable could justify collecting a State tax, on the Treasurer's warrant issued without any law, granting such tax. The difference is, that in the latter case, the Court takes notice, as a matter of course, whether any law exists granting such State tax or not. In the former case the Court have no knowledge of what the town have done, until it be shewn in pleading or in evidence; and until this be done, they must go upon the maxim, that what appears not to them, has no legal existence.

It may further be observed, that towns and all other corporations, exist as such, and derive their power from the law solely. They are artificial bodies—their powers are not general, at the pleasure of the members, nor are they inherent: while they act agreeably to their legal powers, their acts are within their proper limits, as valid and binding as the general laws of the State: when they do not proceed agreeably to their legal powers, their proceedings are absolutely null and void, nor have they the least force to authorise, justify, or excuse any officer who shall attempt their execution.

If an action of trespass might be maintained against a town in a corporate capacity, it would deserve consideration in this case. But no action of trespass can be maintained against a corporation—this follows from what has been before observed. If the members of a corporation, though ever so formally assembled, do, or agree to do, an act which is illegal and wrong, the law will not consider it as the act of the corporation, but of the acting individuals in their natural capacities. As such act binds no one, so it authorises no one to carry it into effect; and if an injury ensue, all who act in the business are volunteers in the injury.

These I take to be the principles of the common law, as old as the law itself—principles which are not subject to the controul of the Court, nor in the power of the Court to alter without legislative aid. If an action will not lie against the acting members in this case, there is an injury without a remedy. The collector is, and must

be an inhabitant and member of the town, and in cases like the present, he is clearly an acting member—indeed, the only member immediately acting, in what is charged to be an injury. As such, he is liable, if any one can be liable, either by himself or jointly with others. Whether a collector would be answerable for an injury arising to any one by an unjust or unequal assessment, is a question which does not arise in the present case.

As to the proceedings of the town, in settling their minister, I think we have nothing to do with them, in this case; for let the mode of proceeding in the settlement be what it may, if the minister continued to preach to them by agreement, or consent, he was entitled to a compensation, and the town had a right to vote a tax for the purpose of making him a compensation.

Another argument I ought to have noticed, which was urged by the counsel for the defendant, and seems to have weight with my brother Hall. It was said that collectors are obliged to collect all taxes committed to them, and are made accountable for them without any exception—that as this puts the legality of the tax out of the question, with a collector, he ought not to be made liable if it be illegal. The words of the statute are, "All collectors of rates shall gather and pay the rates to them committed for collection, by such times, and to such persons, as they shall be directed in their respective warrants; and if any collector or collectors shall not perform the trust committed to him or them, according to law, he or they shall be accountable for such rate, or such arrearages thereof, &c." I cannot think that this paragraph affects the present question. It was designed solely to point out the duty of collectors, in collecting taxes, and to enforce their performance. It could not be intended to indemnify collectors of towns, in distressing the inhabitants with the collection of pretended taxes, which had never been granted; and an illegal grant, in this case, and no grant, have the same legal effect.

Such a construction would be very arbitrary, and would open a door to very great injustice. In the act regulating the office and duty of Sheriffs, it is enacted "That Sheriffs and Constables shall receive all manner of writs, at any places and at any times, within the limits of their jurisdictions, when and wheresoever they shall be tendered to them, and shall execute the same, according to the di-

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rection therein given." The expression in this act is stronger than in the act before recited; yet, surely, no one will suppose that the Sheriff or Constable is bound to receive or execute a writ, apparently illegal, or that either of them would be indemnified in arresting the body or seizing the property on such illegal writ. The law recognizes no writs but such as are legal.

For these reasons, I am of opinion, that it is necessary for the defendant to shew a tax or taxes legally granted by the town of Charlotte, before he can offer in evidence the rate-bills and warrant, which are his immediate authority for collecting the same.

WOODBRIDGE, J. agreed in opinion with HALL, J. and gave the same reasons.

The counsel for defendant then produced two warrants, dated February 24, 1794 and 95, and the rate-bills to which the warrants severally referred. It also appeared in evidence, that the selectmen who had signed the rate-bills, had been legally chosen and sworn.

The counsel for the plaintiff took an exception to the warrants and rate-bills, as being illegal on the face of them. The warrants appeared to be signed by —— Strong, Justice of the Peace, directed to the defendant as collector of the town of Charlotte, and commanding him to collect the rates as assessed in the respective rate-bills, as referred to in each warrant, but neither of the warrants mentioned any tax to have been granted or voted by the town. On one rate-bill was endorsed "Mr. Gillet's rate for 1793"—on the other, "Mr. Gillet's rate for 1794," and each bill was subscribed by the selectmen of Charlotte. It was insisted, that as no mention was made in the warrants, of any vote or grant of a tax or taxes, they were not sufficient for the defendant.—That in the former question it was supposed that the warrants would shew that the several taxes had been granted by the town, but on their being produced it appeared otherwise.

The Court, after hearing an argument on this point, were of opinion, that these warrants were not on the face of them legal.

The counsel for defendant then offered in evidence the proceedings of the town in the settlement of Mr. Gillet, in the year ——. The town had regularly voted to give Mr. Gillet, on his settlement

as their minister, a certain sum by way of settlement, and a certain sum (which was the sum contained in each of the rate-bills produced) yearly, for his support, and offered to shew that Mr. Gillet was settled and ordained accordingly.

The counsel for the defendant said, there was no necessity, that in such case, a tax should be directly voted by the town.—That when the town had agreed with a minister for a certain sum annually, the statute for supporting ministers of the gospel made it an annual tax on the town. By that statute, every town and parish are authorised, among other things, to settle a minister, "and further to vote such minister such settlement and annual support in money, or otherwise, as shall be agreed upon between such minister and people, and as it shall be found necessary, to be assessed on the polls and rateable estates of persons living and estates lying within such town or parish."—That nothing more was necessary, than that the town should vote the minister a certain sum annually, and the statute directs in what mode it shall be raised, by an assessment on the polls and rateable estates of the inhabitants, as there prescribed.—That such vote was equivalent to the grant of an annual tax, to the amount agreed upon, and so long as the minister should continue to preach agreeably to the settlement.

The plaintiff's counsel in reply, observed that this was a contract only between the town and Mr. Gillet; at least it became so on Mr. Gillet's compliance—it has nothing to do with the mode of raising the money. The most that can be made of the statute is, that it authorises a town to vote a tax or taxes, to enable them to fulfil their contract, if it should be necessary to raise the money in that mode.

HALL, J. I consider it doubtful whether the statute intended that a tax should be levied from year to year, to enable the town to fulfil their engagement, without any further vote of the town, but am of opinion that the whole should be left to the Jury.

CHIPMAN, Ch. J. I am clearly of opinion, that the clause which has been recited, will not bear the construction contended for by the defendant's counsel. The town might have other means of raising the money, and the minister might be settled with that view. The clause recited seems principally intended to designate the fund

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out of which the town or parish might raise the money if it should be voted, and the persons who should be liable to be taxed in such case. It would be giving great latitude of construction, to say that it authorised the town or parish, where they should vote a settlement and annual support for the minister, to vote also that the same should be collected from time to time, as it should fall due. But it does not appear that the town of Charlotte has done this. I consider this to be properly a question of law, which it is the duty of the Court to decide. Where a doubt arises on the weight of evidence to prove certain facts, which as they may be found, would bring the case within certain rules of law, or not, it is the province of the Jury to decide, that is not the present case. The question now before the Court, is a previous question of law, independent of any fact to be found by the Jury.

The evidence, therefore, offered by the defendant, ought not to go to the Jury.

WOODBRIDGE, J. was of the same opinion.

Verdict for the plaintiff.

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If a defendant, in an action on contract, had, before the commencement of the plaintiff's action, become liable to pay a demand, against which, the plaintiff was bound to indemnify him, yet if the defendant had not paid the demand before the commencement of the plaintiff's action, he cannot plead it in offset.

In a declaration on a contract for the payment of specifick articles, at a particular time and place, it is not necessary to aver, that plaintiff was ready at time and place to receive them.

The rules of Court do not permit either party to change his plea after an issue of fact has been joined in the case.

Chittenden, January, 1797.

THIS was an action of *assumpsit* on note, or written instrument, dated February, 1791, in which Coit acknowledged the receipt of £185, 4*s*. of Carpenter, which sum he promised to pay to Carpenter on the first of October, 1791, in due-bills payable out of the road tax on the town of ——— if due-bills to that amount should be allowed by the County Court for the County of Chittenden.

And if a sufficient sum should not be allowed of such due-bills, then the remainder in certain other due-bills. Payment to be made at the dwelling house of said Coit in Burlington.

Chittenden, January, 1797.

Carpenter vs. Coit.

The defendant, in the Court below, had plead the general issue, and an offset, in two counts. The first count was on a promise to indemnify and save harmless the defendant against any damages which he should sustain in consequence of his becoming bail to one Pomroy, who was recognized for the prosecution of a certain writ of *Audita Querela*, prayed out by the present plaintiff. And it was averred, that the defendant had been compelled to pay a large sum (which was particularly specified) that had been recovered against Pomroy on his recognizance. The promise was alleged to have been made before, and the money to have been paid since the commencement of the present action. The second count was for money paid, laid out and expended.

To both which counts in offset, the general issue had been pleaded in the Court below.

Fay, for plaintiff, moved for leave to alter his plea to the first count of the defendant's plea in offset, and to demur, on terms.

By the Court. The rule of this Court, allowing parties to alter their pleas, has never been construed to permit either party to alter his plea, after an issue of fact has been joined. It has been often so ruled. It was so ruled in House against Billings.

The cause now came on to trial, on the pleadings and issues as above stated.

The note being admitted, was read with an endorsement of a considerable sum as having been received.

The counsel for the defendant then stated their evidence on the plea in offset.—That the defendant, long before the commencement of the present action, had, at the request of the plaintiff, procured one Pomroy to become recognized for the prosecution of a writ of *Audita Querela*, as mentioned in the first count of the defendant's plea in offset.—That the defendant engaged to indemnify Pomroy, and the plaintiff promised that if the defendant should be compelled to pay any thing on that account, the same should be allowed on the contract now in suit.—That the *Audita Querela* was determin-

Chittenden, January, 1797.

Carpenter *vs.* Coit.

ed against the present plaintiff, and a recovery had, for a large sum against Pomroy, on his recognizance, at the adjourned term of the County Court in June last, which sum the defendant, agreeably to his engagement with Pomroy, had paid.

The counsel for plaintiff objected that this evidence was not admissible under the statute, as it will not prove a debt due at the time of the commencement of the plaintiff's action.

For defendant it was insisted, that it would be unjust to exclude the proof of this sum in offset, since it was paid on an agreement so to be applied, though not actually paid before the commencement of the plaintiff's action. The agreement however was long before; but from the nature of the business, the defendant had been compelled to pay nothing until June last. The plaintiff ought in consequence to have forborne the suit on this note, or to have paid what was recovered against Pomroy; but since he has done neither, the sum so paid ought to be allowed in offset, which would only be carrying into effect the agreement of the parties, and compelling the plaintiff to do no more than he ought in conscience to have done, and in the same manner as it had been agreed.

CHIPMAN, Ch. J. The statute is pointedly against the defendant, upon the offset. But if it be proved, that plaintiff agreed to allow the defendant on the note, whatever he might be compelled to pay to Pomroy, the defendant may have justice in the case, consistent with the rules of law, and without the aid of the statute of offsets. For if the plaintiff agreed, that whatever the defendant should be compelled to pay, on account of his engagement to Pomroy, should be allowed as so much paid on the contract now in suit, the plaintiff could in no way discharge or avoid that agreement, but by preventing any thing coming against Pomroy, on account of his recognizance, or, by paying it himself. And if he has suffered a recovery to be had against Pomroy, and the defendant has paid the money so recovered, it may be proved in payment, under the general issue.

If the plaintiff directs payment to be made on a demand already in suit, and payment be made accordingly, at any time before the trial, such payment may be given in evidence under the general issue.

HALL, J. and WOODBRIDGE, J. concurred.

The offset was abandoned, and the defendant attempted to prove the agreement as above stated, but failed in his proof. The Jury therefore found a verdict for the plaintiff.

The defendant's counsel moved in arrest of judgment, for insufficiency of the declaration on two grounds. 1st. That it contained no averment that the plaintiff was at the house of defendant, in Burlington, on the said first day of October, 1791, (the place and time of payment appointed in the note) ready to receive the payment, &c. 2d. That it contained no averment that the accounts for work in the town of ——— had been allowed by the County Court.

Fay, for the plaintiff, contended that the averment in the first exception was unnecessary—that the want of it would not have been fatal on a general demurrer—that the averment in the last exception would have been improper. At any rate, if one or both of the exceptions might have prevailed on a special demurrer, yet they were aided by the verdict. 5 Com. Dig. pl. b. 87.—In *assumpsit*, that plaintiff should not be disturbed in carrying away furze from a certain place where the furze was to be taken, there was no averment that he was disturbed before that day. It was held that this defect was cured by the verdict.

The counsel for defendant, in support of the motion, contended that the averments in both instances were necessary. In support of the first exception, it was urged, that the defendant was not holden to pay, unless the plaintiff was ready at the time and place to receive the payment. Upon the second exception, they said that the allowance of the accounts by the County Court, as mentioned in the note, was a condition precedent.

The Court were of opinion that the declaration was good after verdict. As to the first exception, such averment in this case is not matter of substance. It is not traversable, nor any way necessary in proof, for it was not stipulated that the plaintiff should be personally ready, &c. At any rate, it is cured by the verdict. As to the second exception, the payment of the sum contained in the note, was not to depend on the allowance to be made by the County Court. The failure of a sufficient allowance, only changed the residuum of payment, by substituting other due-bills. Any averment, therefore, to this point, would have been impertinent.

The defendant can take nothing by his motion.

Chittenden, January, 1797.

JOHN DOE ex dem. PEARSAL *vs.* THORP.

If a defendant, in an action of Ejectment, prove that he purchased the whole of the lot demanded—went into possession and cleared one acre, more than fifteen years before the commencement of the plaintiff's action, he will hold the whole lot by the statute of limitations. A possession of a part, under such purchase, being a possession of the whole, is a bar to the action.

THIS was an action of ejectment for two hundred acres of land in the town of Charlotte, being the —— division of the original Right of Jonathan Aikens.

Plea—*The General Issue.*

The plaintiff made a clear title to the Right of Jonathan Aikens in Charlotte, in the lessor, a severance among the proprietors, by which, the lot of land demanded was legally divided to the Right of said Aikens; and also proved the defendant in possession.

D. Chipman, for defendant, stated that one Howlet purchased the lot in question of —— Walbridge, entered into posession and improved the same, as early as June, 1785.—That he continued in possession until he sold the lot to Moses Yale.—That Yale possessed and improved it till he sold fifty acres to Stephen Yale, and the remainder to Scovil.—That S. Yale and Scovil possessed and improved it till they afterwards severally sold to the defendant, who has since lived upon and improved the premises, and as a bar to the plaintiff's action, relied upon the clause of limitation in the statute for "settling disputes concerning landed property," there having been in the defendant and those under whom he claims, an uninterrupted possession against the lessor's title, from June, 1785, till the present time. The plaintiff's action not having been commenced, till long after the first day of July, 1788, the time limited for bringing actions in such cases.

Witnesses, on the part of the defendant, were then called to prove the purchase and possession of Howlet, and the sales and continuance of possession from Howlet, through the Yales and Scovil to the defendant. It appeared that the sales had in every instance been made by deed, which the defendant offered to prove by parol, without producing the deeds.

Marsh, for plaintiff, objected to proving by parol, a conveyance,

which appeared to have been made by deed, and insisted that the deeds ought to be produced—that such was the general rule of evidence.

Chittenden, January, 1797.

Pearsal *vs.* Thorp.

D. Chipman, for plaintiff, contended that to prove a transfer of the possession merely, it was not necessary to produce the deeds—that for present purposes, a transfer without deed was sufficient. If there were deeds, they were superfluous. What might be done without deed, might be proved without deed. Besides, such have been the decisions in this Court.

The Court permitted the defendant to proceed with parol proof. Upon which the Chief Justice said that he concurred, because such had been the precedents in this Court. He was unwilling, therefore, to surprise the party, by altering the decisions at the moment of trial. He did not, however, see the distinction on which the decisions in this case were founded. It was true that the possession of land might be transferred without deed, but it might be also by deed; and if it be made by deed, the deed will prove it, and is surely better evidence than parol proof, according to the general rule of evidence, founded on the soundest principles. If the transfer was by deed, the deed, as in other cases, ought to be produced. It might also be important in ascertaining how much was possessed under such transfer.

The defendant failed in proving that Howlet possessed the premises in the year 1785, and the Jury found a verdict for the plaintiff.

Defendant entered a review.

On the trial of this action upon the review the next term, the plaintiff having, as on the former trial, shewn a title to the lot in question, the defendant relied on the statute of limitation, passed the 27th day of October, 1785.

To bring the case within the statute of limitations, the defendant proved that one Howlet, having purchased the lot in question of one Walbridge, went into possession in the month of October, 1785, before the 27th day of the month, and cleared one acre. The defendant also made out a regular chain of title from Walbridge to himself, and that the possession had accompanied the title.

Hitchcock, for the plaintiff, contended that the defendant had at

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most acquired a title to the acre only which he had cleared, and that the plaintiff was entitled to recover the remaining part of the lot.

D. Chipman, for defendant, admitted that if Howlet had gone into possession of the lot without any purchase or claim, and made improvements on one acre only, he could not hold by the statute of limitations more than that acre, and possibly not that, as it might not appear that his possession was adverse to the plaintiff's title. But since he purchased the whole lot, and went into possession under the purchase, his possession of a part, was a possession of the whole, adverse to the plaintiff's title.

The Court decided, that as the defendant purchased the whole lot, and went into possession under such purchase, he was, in contemplation of law, in possession of the whole lot.

Verdict for the defendant.

NOTE —As a judgment in an action of ejectment, was not, at that time, a bar to another action of ejectment for the same land, the plaintiff brought an action of ejectment for the same lot, before the Circuit Court holden by Judges *Patterson* and *Paine*. On trial of the action at May term, 1799, the evidence was the same as on the last trial before the Supreme Court, and the only question was whether the defendant was entitled to the whole lot by the statute of limitations, or, to the acre only which he had cleared.

The Court decided that the defendant's possession of the one acre, under a purchase of the whole lot, was a possession of the whole lot, and the defendant had a verdict.

ALLEN *vs.* MANN.

The taking out of a writ, is the commencement of an action, to save the demand from the statute of limitations, and not the service of the writ.

Chittenden, January, 1797.

THIS was an action of trespass on the case, in which the plaintiff declared, in substance, that on the 26th day of November, 1793, he took out a writ of summons of that date, signed by ———; against W. G. of Vergennes, on a note of hand given him by the said W. G. on the 10th day of January, 1794, for the sum of £——, which

writ was made returnable to the County Court then next to be holden for the County of Chittenden, on the —— Monday of February, 1794.—That on the 30th day of November, 1793, he delivered the said writ to the defendant, then a legal Constable of said Vergennes, to serve and return according to law; and though the defendant had a reasonable time and opportunity to serve the same, yet he altogether neglected and wilfully refused to serve the same before the first day of December, then next, whereby the plaintiff's action on said note was barred by the statute of limitations, and the sum due thereon wholly lost to the plaintiff.

Chittenden, January, 1797.

Allen vs Mann.

The writ in the present action was dated the 9th day of January, 1794.

Plea—*Not Guilty.*

The plaintiff proved the note against W. G.—the taking out of the writ and its delivery to the defendant, (who was also admitted to be a Constable of Vergennes) on the 30th day of November, 1793, which was on Saturday, near sun-set. It was farther proved, that on Monday following, which was the 2d day of December, the defendant being informed that the statute of limitations had run on the demand, returned the writ to J. S., from whom he received it, and who acted as attorney for the plaintiff, without having made service. It farther appeared, that a few days after, the defendant on taking advice, went to J. S., who still had the writ, and offered to serve it at his own peril, but J. S. refused to permit him to serve it.

Chipman, Ch. J. It will be in vain for the plaintiff to proceed. It is clear, as well from the declaration as the proof, that there is no foundation for the action. The declaration is wholly insufficient to support a judgment, should the plaintiff obtain a verdict. From his own shewing it appears that the plaintiff has sustained no injury, unless from his own voluntary act. The taking out of a writ is the commencement of an action, to avoid the statute of limitations, if it be actually taken out, it is sufficient if it be served in time for the next Court, to which it must be made returnable. The statute of offsets has made the day of serving the writ, the commencement of the action, for certain purposes. The statute of limitation has made no such alteration: it remains, therefore, as at common law, and when the defendant received the writ, he had the whole time of service to the next Court (some time in the beginning of February) to

Chittenden, January, 1797.

Allen vs. Mann.

make the service. Until that time, from the nature of the thing, the plaintiff could sustain no injury, and could have no cause of complaint against the officer. At the time of bringing this action, the 9th day of January, 1794, the time of service not being then expired, it is apparent there could exist no right of action in this case. The defendant ought to have demurred. It would be nugatory for the plaintiff to take a verdict, for a judgment in this case could not be supported. Indeed, though the evidence proves the facts alleged in the declaration, it does not prove the defendant to have been guilty of any thing which the law can deem an injury. He is in fact charged with nothing upon which to say he is guilty. If the plaintiff or his agent, has not permitted the writ afterwards to be served, although there was ample time, as it appears, he has lost his debt by his own latches, or his eagerness to entrap an officer who had done nothing amiss.

The other Judges concurring, the counsel for plaintiff suffered a verdict to be taken against him.

EVERTS *vs.* BROWN.

A covenant in a deed by B. conveying lands to E. in these words—"That said E. shall hold the premises, so that neither I the said B., my heirs or assigns, or any person claiming in or under me or them, or under New Hampshire, shall ever have any right, title, interest or demand thereto, but shall by this deed, be forever barred and excluded," has not the same legal effect, as a covenant of seisin or a covenant of warranty.

To shew a breach of this covenant, it is not necessary to prove an eviction, as in an action on a covenant of warranty, nor is it broken by a dormant title, not put in exercise.

But if a person be in possession, holding under New-Hampshire, adverse to the plaintiff's title, it is a breach of the covenant.

Addison, January, 1797.

THIS was an action of covenant, on a deed of bargain and sale, by the defendant to the plaintiff, of five hundred acres of land in the town of Castleton, butted and bounded, for the consideration of £95, dated November 16, 1774. The covenant was, that the said E. should hold the premises, &c. so that neither the said B., his heirs or assigns, or any person claiming under him or them, or un-

der New-Hampshire, should ever have any right, title, interest or demand thereto, but should by the said deed be for ever barred and excluded.

Addison, January, 1797.

Everts *vs.* Brown.

It was alleged as a breach, 1st, That at the time of the said bargain and sale, the premises were not the property of the said B. 2d, That the said B. had no right to sell. 3d, That he was not seised of the premises, but that some person or persons unknown to the plaintiff, were seised thereof, and that such person or persons, claimed title to, and were duly seised under a title derived from New-Hampshire.

Defendant pleaded that he had not broken his covenant, &c. upon which issue was joined.

Miller, for the plaintiff, produced and read a deed from the defendant to the plaintiff, as stated in the the declaration. He then stated that he should not attempt to shew an ouster of the plaintiff from the premises, but to shew that there was a grant of the town of Castleton, in which the premises are described to lie, to a number of proprietors—that the premises had never been severed to the defendant, nor any person under whom he claims.—That one of the publick rights granted in that town to the first settled minister, had been surveyed on a part of this 500 acres, and that there were persons in possession by title, adverse to that derived from the defendant.

Darius Chipman, for defendant, objected that this is in its nature and effect a covenant of warranty, and a breach of it can be proved by nothing short of an eviction, or, that which is tantamount.

For the plaintiff it was answered, that this covenant, at least, resembles a covenant of seisin—that it would therefore be sufficient, to shew a breach, to prove that some person under an adverse title, against which the defendant had covenanted, was in possession.

The Court were of opinion that this was not altogether in the nature of a covenant of warranty, and that it would be sufficient for the plaintiff to shew, that some person held the premises, by a title adverse to the title conveyed by the defendant in his deed, within the words of the covenant.

The plaintiff's counsel then produced and read a charter of the

Addison, January, 1797.

Everts vs Brown.

town of Castleton, from the Governor of New-Hampshire to sixty proprietors, dated the 22d day of September, 1761, and further offered to give in evidence a survey of the land described in the aforesaid deed, or a part of it, to the minister's right, and depositions to prove that such survey had been made.

To this, the counsel for the defendant objected.

The Court was of opinion, that the survey could have no effect, unless it had been made in pursuance of a regular and legal division of the town, which can be shewn by the proprietors' records only.

The plaintiff's counsel then offered to prove, that at the time of the sale from the defendant to the plaintiff, 16th Nov. 1764, there was no division of the town, therefore the proprietors will appear to be seised and in possession by virtue of a title under New-Hampshire, adverse to the title supposed to have been conveyed by the defendant.

The Court were of opinion that it was not pertinent to give such negative proof.

The Chief Justice observed, that the proof, as it now stands, is of an undivided township of land. The plaintiff may shew a legal division, and that the land described in his deed from the defendant, was legally divided to some other proprietor, in opposition to his claim, under the defendant's deed, which will prove a breach. Or the defendandt may, in my opinion, be permitted to shew himself a proprietor, and that in the division, the land in question was severed to the plaintiff, under his title, in which case there could be no breach, as it relates to a title under New-Hampshire. But this would be proper only to rebut the plaintiff's evidence.

The counsel for defendant then offered to prove that the defendant was owner of several proprietors' shares in the town of Castleton. To this there was an objection, and the Court were of opinion, that it could have no effect, unless a division could also be shewn, by which, it should appear that the land in question had been divided to the defendant's rights—that the defendant would have a right to fortify himself if he was able, with proof of a full right by proprietorship and division.

The counsel for defendant then offered to prove that the plaintiff

had sold part of the 500 acres to A. Landon, whose estate had, by a legal sentence, been confiscated to the use of this State, and the land he had so purchased of the plaintiff, was sold as the estate of A. L. by a commissioner of the State to one D. who now holds the same. They then read a deed from the plaintiff to A. L. of 100 acres, part of the premises, dated June 10, 1776, and a copy from the records of the Court of confiscation, by which it appeared that the estate of A. L. had been confiscated to the use of the State of Vermont.

A deposition was then offered to prove that the said 100 acres was sold by a commissioner of the State to D.

By the Court. It is necessary first to shew the appointment of the commissioner, either by a record of his appointment, or his commission, and to shew the sale by his deed. Nothing short of that can be admitted.

CHIPMAN, Ch. J., in his charge to the Jury, after stating the evidence, observed—In the determination of this cause, it will be necessary to fix the true construction of the covenant contained in the deed, from the defendant to the plaintiff; the words of which are, "To have and to hold, &c. so that I the said B., my heirs or assigns, nor any person claiming under New-Hampshire, shall ever have any right, title, interest or demand thereto, but shall, by these presents, be for ever barred and excluded."

It is not precisely a covenant of warranty, nor is it a covenant of seisin; yet it partakes of the nature of that covenant, so that within certain limits, it is an engagement against every existing right, title, &c. paramount and adverse to the title supposed to have been conveyed by the defendant, although the same may never have been exercised or prosecuted to the actual disturbance of the plaintiff.

The plaintiff has proved that the township of Castleton, in the year 1761, was granted to sixty proprietors as tenants in common. No division appears to have been made, either before or since the defendant's sale to the plaintiff; so that there appears to be an adverse title in the proprietors under the New-Hampshire grant. For if the defendant should appear to have the right of one or more of those tenants in common, yet, before a legal division or partition, he could not as against the other tenants, sell and convey the title to any particular tract by metes and bounds. This is giving the

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covenant the construction of a covenant of sesin, which the parties seem to have avoided in drawing the deed.

On the other hand, for the defendant it is contended that this covenant must have the construction of a covenant of warranty.—That it amounts to a covenant against the exercise of an adverse right, &c. derived under the defendant, his heirs or assigns, or, under New-Hampshire, by any person, to the actual prejudice of the plaintiff's right.—That of course, nothing short of the exercise and prosecution of such adverse right, operating as an actual ouster of the plaintiff's right in the granted premises, can prove a breach of the covenant.

In construing covenants, we should endeavour to discover the true meaning of the parties to the contract, and this we must collect from the contract itself, giving due weight to all the operative words connected with the covenant.

Considering it in this connexion, it seems to me, that the true construction of the covenant is, that the defendant in his deed of conveyance, covenanted against every right, title, &c. under him, his heirs and assigns, or under the New-Hampshire grant, whereby any person should actually defeat, in whole or in part, the plaintiff's title as derived from the defendant, and there was no view of engaging against any dormant right, title or claim, unless put in exercise to the prejudice of the plaintiff's claim.

To this construction we are led, by attending to the concluding words of the covenant, in connexion with what precedes—"but shall be by these presents, for ever barred and excluded."—This, it seems to me, qualifies the generality of the covenant, and limits it to extend to adverse rights, &c. exercised or prosecuted, not to those which are suffered to lie for ever dormant, so that there can be no opportunity of determining whether they might be barred and excluded by the defendant's deed or not. Upon this construction, these words will operate agreeably to a known rule in the construction of covenants—that the generality of a covenant may be restrained by particular expressions. These last words must have this effect, as it appears to me, or be considered as mere surplussage. The covenant then will have merely the effect of a covenant for quiet enjoyment, under certain limitations.

If we take this to be the true construction, the plaintiff has not

shewn a breach of the covenant; for nothing appears but that the plaintiff, or those who derive through him or his title, still hold and enjoy the land described in the deed from the defendant.

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Everts *vs.* Brown.

Verdict for the defendant.

EASTMAN *vs.* HODGES.

An agent is a competent witness to prove the payment of money, for his principal, although he be accountable to the principal, in case the principal cannot avail himself of such payment

If money be paid by A. to B on a note which B. holds against A., and B refuse to endorse it on the note, or to allow it in payment, A may recover the amount of B. in an action of *indebitatus assumpsit* for money had and received, altho' the note still remain unpaid.

Addison, January, 1797.

THIS was an action of *indebitatus assumpsit* for money had and received.

Plea—*The General Issue.*

Gilmore was produced as a witness on the part of the plaintiff, to prove that he, as the plaintiff's agent, had paid the money to the defendant.

Darius Chipman, for the defendant, objected that as Gilmore received the money of the plaintiff, to pay to the defendant, he stood accountable to the plaintiff for the money, unless it could be proved that he paid it over; consequently he was interested, and not a competent witness; for he is not discharged unless the plaintiff recover in this action. A recovery will discharge him.

By the Court. It is the case of an Agent. It does not go to the competency of the witness, but to his credibility only. The objection was accordingly overruled, and the witness was sworn.

He testified, that the plaintiff sent by him £15, to pay to the defendant on a note, which the defendant held against the plaintiff—that he paid the money to the defendant, who said he would endorse it—took out a piece of paper and wrote, as he supposed an endorsement on the note, but said he did not know this, because he could not read.—That having afterwards understood that the defendant denied having received the money, he called on him in company

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with the plaintiff—that the defendant said he did not receive the money on account of the gold falling short in weight, and that the witness carried it away.

Other witnesses testified that the defendant afterwards produced the note, and that there was no endorsement upon it.—That he insisted on being paid the whole amount of the note, which he said was due, and refused to receive what remained due after deducting the sum said to have been paid by Gilmore, although once tendered by the plaintiff.

On the part of the defendant, depositions were read, to prove that Gilmore did not pay the money, but that he carried it away.

The counsel for the plaintiff insisted that as the money was paid, and the defendant had constantly denied the receipt of it, and refused to apply it on the note, the plaintiff was entitled to recover.

The counsel for defendant insisted that if the Jury were of opinion that Gilmore had paid the money, (which he did not admit to be proved) yet the defendant ought not to be accountable in this action.—That if the money was received, it was received on a note, on which there was, and still is due, more than the amount of the money said to have been paid. If proved to have been received, the defendant would endorse it on the note.

CHIPMAN, Ch. J., in his charge to the Jury, observed, that if they found that the money was paid, the action was well supported. Had the defendant received the money and merely neglected to make the endorsement, but stood ready to allow it on the note, it would have been a different case. But as he has constantly denied the receipt of the money, and still denies it, and has demanded the whole amount of the note, should he, on the suggestion of his counsel, recover in this action and obtain a bill of cost, there is no security that he will hereafter allow it on the note. As he has refused to apply the money and account for it as originally intended, and has here defended on that ground, it is but justice that he should account for it in this action.

Verdict for the plaintiff.

Addison, January, 1797.

Doe ex dem. Britton *vs* Lawrence and Clark.

If in the Records of a proprietors' meeting, it be stated that such meeting was legally warned and holden, it is not only *prima facie* evidence that such meeting was legally warned, but is also *prima facie* evidence that the different articles of business acted upon at such meeting, were inserted in such warning.

Parol evidence cannot be admitted to explain proprietors' records, or to add what might have been omitted in making up such records

If a plaintiff in Ejectment rely on the proprietors' records to shew that the lands in question were severed to his right, he must shew by the records that such severance was made agreeably to the statute regulating proprietors' meetings.

THIS was an action of ejectment for fifty acres of land, being the north half of Lot No. 14 in the 2d division of lands in Weybridge.

On the trial, the plaintiff proved a title in his lessor to half of the right of Z. D. one of the grantees in the charter of Weybridge. The counsel for plaintiff further stated, that in the division of the town of Weybridge, the fifty acres in question had been legally voted by the proprietors, to the settler on the half right of Z. D. owned by the lessor of the plaintiff.

To prove this, the proprietors' records were produced, which began with reciting that "At a meeting legally warned and holden, &c."

The counsel for defendant objected that the meeting of the proprietors was in fact illegal, although it was to be taken, *prima facie*, from the records, to have been legal, and to impeach the legality of the meeting, offered to prove, that it had ever been the opinion of the proprietors that the meeting was illegal.

By the Court. Records expressing a meeting of proprietors to have been legally warned and holden, have always been considered in this Court, *prima facie* evidence of the legality of the meeting—it may be impeached, but this cannot be admitted from slight presumptions and vague opinions. If you would impeach the legality of the meeting in this case, you must point out particularly wherein it was illegal, and support it by legal evidence.

It was further contended by the counsel for the defendant, that the law empowering proprietors to vote to settlers their lots, in lieu of their draughts, required that it should be done only at a meeting

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warned for that purpose; and to entitle the plaintiff to read such vote, it was necessary for him to shew that an article was inserted in the warning, notifying the proprietors that it was intended to pass such vote.

By the Court. Upon this record, the meeting must be taken to have been legally warned, for the purpose of passing every vote which had been passed at the meeting, unless the contrary be shewn.

The counsel for plaintiff then read a vote of the proprietors, to assign one half of Lot No. 14 to the right of Z. D. and the other half to the right of M. J. The next vote was to assign the whole of No. 14 to the right of Z. D. and another vote to assign No. 42 to the right of M. J. A survey of No. 14 was then read. This Lot, in a former attempt at a division of the town of Weybridge, had been drawn to the right of Z. D.

For the plaintiff, was read in evidence, to prove a division of the town of Weybridge—1st, A vote from the proprietors' records for two divisions;—the first division to consist of one acre—the second of one hundred acres.—A vote, appointing a committee to make a plan and survey. 2d, An allotment and survey. There was also offered, a paper, purporting to contain minutes of a draught of a division of lands in Weybridge, in which, more than forty rights were minuted, as exempt from the draught. On the back of the paper was written, "Voted the within proprietors, as settlers.

"A. W. *Proprietors' Clerk.*"

The counsel for plaintiff, further offered parol evidence, to explain, as they expressed it, and reconcile the records, by shewing that the vote, as recorded, assigning half of Lot No. 14 to the right of Z. D. was never, in fact, passed, but was entered by the Clerk through mistake, and to shew that those who were the owners of the rights voted to settlers, were settlers in fact.

The counsel for defendant objected to the paper and minutes offered—that they were not authentic; and to the parol evidence, to supply or vary the record.

By the Court. The paper purporting to contain minutes of a draught ought not to be read in evidence, as it does not appear to

have been recorded as an act of the proprietors, or from any thing which accompanied it, to contain any matters acted upon at a proprietors' meeting. The endorsement by A. W. proprietors' Clerk, was not, under the circumstances, sufficient to warrant such conclusion. As to the other point, the Court are of opinion, that parol proof is not admissible to reconcile or explain the record, or to add what was omitted by the proprietors' Clerk. That if such records might in any way be impeached by parol evidence, (which is not necessary in this case to decide) certainly no addition can be made by parol. The record, on the face of it, must appear to be good and sufficient: if an ambiguity should arise from parol, it might also be explained by parol. It is not admissible to prove that forty rights and more, were voted to the owning settlers, in which case alone the proprietors had power to except from the draft. It would destroy all confidence in such records, were it admitted to curtail and supply them on occasion, from the accidental, and often treacherous recollection of witnesses.

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On the part of the defendants it was proved, that Clark, one of the defendants, had a good title to half of the right of Z. D. and the right of M. J. in Weybridge.

D. Chipman for plaintiff.

Darius Chipman and *Miller* for defendants.

CHIPMAN, Ch. J., in his charge to the Jury, observed, that as the defendants were in possession, it was necessary that the plaintiff should make out a good title in every point, before he could remove the defendants.—That although the lessor of the plaintiff appeared to own the half of an undivided share in Weybridge, yet he had failed in proving a right to the fifty acres demanded, as the north half of Lot No. 14, drawn and divided to the right of Z. D.—That no legal division had been shewn.

The proprietors had proceeded legally in warning their meeting, and voting to make their division, and in making a survey and plan of their allotment; but their subsequent proceedings did not appear to be warranted by any law. No draft in fact has been shewn. Three or four votes have been produced assigning particular lots, and parts of lots to particular rights. But the lots were not voted to any persons, as settlers, in lieu of their drafts. For aught that ap-

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pears, it was a mere arbitrary disposition of the lots to serve the interest of a part of the proprietors.

Proprietary divisions are made solely by authority of the statute, and are valid so far only, as they are made in conformity to that authority. That in this case there could be no pretence that the proceedings of the proprietors were in conformity to the statute.

Verdict for defendants.

Burroughs *vs.* Booth.

If in a caption to a deposition, it be certified that the deponent was cautioned to testify the truth, the whole truth and nothing but the truth, yet if the certificate of the oath be, that the deponent was sworn to the truth of the deposition, such deposition cannot be read in evidence.

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ON the trial of this action, the deposition of E. T. taken in the State of Connecticut, was offered to be read.

The counsel for defendant took exception to the caption, that it was certified that the deponent had been sworn to the truth of the deposition, whereas, it should have been certified that the deposition contained the truth, the whole truth and nothing but the truth.

It was certified that the deponent was cautioned to tell the truth, the whole truth and nothing but the truth.

It was contended by the counsel for the plaintiff, that taking the whole together the caption was sufficient. But,

The Court unanimously ruled that the caption was insufficient. It must appear by the certificate of the magistrate who took the deposition that the deponent was sworn that the same contains the truth, the whole truth and nothing but the truth.

This cannot be supplied by any previous caution. It must be in the oath administered.

The deposition was rejected

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January,
1797.

HALE *vs.* GRISWOLD.

The Judges of a County Court, on application of a defendant, may, in their discretion, in cases not provided for by the statute, set aside a judgment rendered on default, on such conditions to be performed by the defendant, as they shall in their discretion prescribe, such as payment of costs to the plaintiff, or waiving some advantage which he may have of the plaintiff in the case, and such proceeding cannot be re-examined in this Court, on writ of Error.

But if in granting this favour to the defendant, the Court order the plaintiff to enter his action anew, and on his refusal to pay to the Court, fees for such entry, order a non suit, it is Error, and the judgment will be reversed.

HALE, the plaintiff in Error, brought his action against Griswold on a promissory note, before the County Court in Addison County, at the September term, 1794. The cause was continued, and at March term, 1795, the plaintiff recovered a judgment on a trial by Jury. The defendant reviewed, and the cause was continued to March term, 1796, at which term the plaintiff obtained a judgment by default. On the third day of the same term, the defendant appeared in Court, and prayed that the default might be erased, which the Court ordered, on the payment of costs to the plaintiff. The costs were paid, and the record proceeds—"The plaintiff being required by the Court, to enter his said action anew, which he refused, the Court do therefore consider that the plaintiff be non-suited in this cause, for want of entering fees being paid anew, and that the defendant recover of the plaintiff, &c"

Whereupon, the plaintiff brought this writ of Error, and assigned the general Error, that judgment was rendered for the defendant, whereas it ought to have been rendered for the plaintiff, &c.

Plea—*That there is no Error, &c.*

D. Chipman, for the plaintiff, contended that although the Court below, might, under the circumstances, have had a discretionary power to erase the default in this cause, which could not be examined into on a writ of Error, yet they had no right to order the plaintiff to pay entering fees anew—that the default could not have been erased under the statute, for that extends only to a default for non-appearance on the first day of the term, to which the writ was returnable. There was no pretence, therefore, that the law authorised this requisition upon the plaintiff. That the demand of entering fees was illegal—the defendant was not bound to pay them, and

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the Court had no right to non-suit him for non-payment. That this was not a non-suit in the common course of business; and the ground of the non-suit appearing on the record, and clearly appearing to be illegal, the judgment ought to be reversed.

Marsh, for the defendant, contended that the Judges of the County Court had the power and the right to regulate the practice of the Court, and to make general and particular rules for that purpose.—That this was a case within the regulation of practice, and the Judges had a right to render judgment, by non-suit or default, against a party refusing to comply with their rules.—That this was a matter of discretion in the Court below, and cannot be re-examined on a writ of Error.

CHIPMAN, Ch. J. The default was not erased in this case, by authority of the statute regulating civil process. That extends, as was observed, only to a default for non-appearance of the defendant on the first day of the term to which the writ is returnable.

The Judges have, certainly, a discretionary power to set aside a judgment rendered on default, if they shall be convinced, that under the circumstances, the defendant is equitably entitled to relief This is a favour to the defendant, and may be granted on condition that he pays cost to the plaintiff, or, that he waive some advantage which he might otherwise have of the plaintiff.

But I am clear, that in such case, the Judges can have no power to order the plaintiff to pay any additional fees, as a condition of his proceeding in the cause after the erasure of the default. The law allows no such fees to be paid a second time, unless where the default is set aside under the statute as just mentioned.

The Judges may not, either of right, or in their discretion, demand or receive of any party, greater fees than are by law allowed. All rules, in the regulation of practice, which should give them greater, or other fees than are allowed by law, would be illegal and void. To refuse justice to a party, or to render judgment against him, for a refusal to pay fees illegally demanded, is certainly wrong. It may be a wrong of the Judges, but a party taking a judgment, always takes it at his peril.

The setting aside of the default in this case was a matter in the discretion of the Judges, which cannot be re-examined in this Court on Error. But the judgment of non-suit being entered, not in the

common course, for default of the plaintiff's appearance, or, for non-compliance with any legal rule, but on a ground manifestly illegal, and that illegal ground of the judgment appearing in the record, I am clearly of opinion that it is matter of Error and proper to be examined in this Court.

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The other Judges concurred.

Judgment of the County Court reversed.

DOE ex dem. BROUGHTON *vs.* BLACKMAN and BEARDSLEY.

The appointment of Constables and other town officers, must be shewn by a certified copy of the record of their appointment, from the Town Clerks, before their acts can be given in evidence.

Rutland, January, 1797.

THIS was an action of ejectment for ninety-seven acres of land in Wells, laid to the original right of J. A. 3d. An act was passed by the Legislature in October, 1787, empowering the selectmen of Wells to levy a tax of one penny on each acre of land in Wells, to be collected by the Constable of the town, who was empowered to sell the land of those who should be delinquent in the payment of the tax. The lessor of the plaintiff claimed as a purchaser of the right of J. A. 3d, which was sold for the payment of that tax.

The act granting the tax was read, and a warrant for the collection of the tax was produced, signed by D. C., J. B. and D. L. as selectmen of Wells, and dated ———, 1788. To prove that D. C., J. B. and D. L. were selectmen for that year, the counsel for the plaintiff offered a certificate of the Town Clerk of Wells, certifying that they were chosen selectmen for that year.

It was objected that this was not sufficient—that the Town Clerk should have certified a copy of the record of the vote of the town, making the appointment.

It was afterwards admitted that the persons named were selectmen.

A warrant was then produced, directed to the Constable of Wells, his name not inserted. Simon Francis was said to have been Constable for that year, and to have collected the tax.

Rutland, January, 1797.

Broughton *vs.* Blackman & Beardsley.

It was insisted by the counsel for defendant, that to entitle his deed of land sold by him, for the payment of the tax, to be read, his appointment as Constable must first be shewn.

To this it was answered, that a Constable was a publick officer: it was therefore unnecessary to shew his appointment.

The Court ruled that his appointment must be shewn, for it was not of publick notoriety who were chosen Constables in the several towns from year to year. They however were of opinion that if the warrant had been directed to Simon Francis, naming him Constable of Wells, it would have been sufficient.

The causé was continued.

DRURY and STRONG, Administrators of ELISHA STRONG, *vs.* SHUMWAY.

It is a breach of a covenant of warranty in a conveyance of land, if final judgment in ejectment be rendered against the grantee, although the grantee continue in possession of the land by means of a subsequent purchase.

In an action for a breach of such covenant of warranty, it is a general rule, that the value of the land at the time of eviction, with interest from that time to the time of rendering the judgment, is the measure of damages; but there are exceptions to this rule. In a case, where the plaintiff in an action of covenant, had, on eviction, recovered of the plaintiff in ejectment a sum for his betterments, that sum will be deducted from the value of the land in assessing the damages.

Rutland, January, 1797.

THIS was an action on a covenant of warranty, in a deed of conveyance, from the defendant to the intestate, in his life time.

The conveyance was of two hundred and twenty acres of land in Brandon, being Lots No. 23 and 35, drawn to the original right of N. F.

It appeared on trial that after the death of Elisha Strong, the administrators, by virtue of an act of the Legislature, sold the said two hundred and twenty acres of land to E. K., and in the year 1789, one Maxwell recovered a judgment against E. K. in an action of ejectment for the same land, under an adverse title. E. K. was by law entitled to betterments on the land, and on a bill filed, recovered of Maxwell £120.

Rutland, January, 1797.

Strong vs. Shumway.

It was stated by the counsel for the defendant, that Maxwell had never taken out a writ of possession on his judgment, and that E. K. had continued to possess the land, and had acquired a good title under a vendue sale for the collection of a certain tax—they therefore contended, that there never had been, and indeed could not be, an actual ouster of any person claiming under the title derived from the defendant. But,

The Court were of opinion, that the judgment, in the action of ejectment, which was against the title, was a sufficient breach of the covenant of warranty to support this action—that it was no prejudice to the defendant, that E. K. had not suffered himself, after the judgment, to be put out of possession, or had purchased the real title to the land. The covenant was broken, by the vendor's failing to defend the title on a final trial.

It was contended by the counsel for the plaintiff, that the plaintiff was entitled to recover the value of the land, at the time of the eviction, with interest from that time.

By the Court. It is a general rule, in an action on a covenant of warranty, that the value of the premises at the time of the eviction, with interest from the time the judgment was rendered, shall be the measure of damages. But there ere exceptions to this rule. In this case, E. K. had not been ousted of the full value of the premises. He had recovered £120 for his betterments, which, in the opinion of the Court, ought to be considered in assessing the damages.

The Jury found a verdict accordingly.

Carlis *vs.* McLaughlin.

If a creditor agree to receive more than legal interest for the forbearance of an antecedent debt, and such illegal interest be included in an obligation given on a settlement of such debt, such obligation is void, it being for a loan of money, within the statute.

Chittenden, Adj'd term, 1797.

THIS was an action of *assumpsit* on a promissory note, bearing date the 4th of May, 1793, for £19, 18*s.* payable on demand with interest.

Chittenden, Adj'd term, 1797.

Carlis vs. M'Laughlin

The defendant pleaded in bar, that on the said 4th day of May, 1793, it was corruptly agreed between the plaintiff and defendant, that the defendant, for the loan of £19, 18s. for which, the note on which the suit was brought, was given, should give to the plaintiff for forbearance, more than at the rate of six per cent. per annum, to wit, ten shillings more than the legal interest, at the rate of six per cent. per annum, which was reserved and contained in said note. Which plea was traversed by the plaintiff.

It appeared in evidence, that on the 4th day of May, 1793. the plaintiff held two notes against the defendant, one signed by defendant for seven and a half bushels of wheat, the other signed by defendant and one ——— for forty-six bushels and thirty quarts of wheat, both on interest and dated at Haverhill in New-Hampshire, where the plaintiff resided. On the 4th day of May, 1793, the plaintiff called on the defendant, and demanded the payment of said notes—the defendant said that he could not at that time make payment. The plaintiff offered to wait if the defendant would give a new note, allowing six shillings per bushel on the principal and interest of the old notes, and give ten shillings more for waiting. The defendant at first refused; but on the plaintiff's threatening to leave the notes with an attorney for collection, he complied and gave his note to the plaintiff for sixty-four bushels of wheat, payable on demand with interest. This, reckoning the wheat at six shillings per bushel, the same price at which the settlement was made on the old notes, included ten shillings over and above the principal and interest.

CHIPMAN, Ch. J., after stating the case and the evidence to the Jury, observed—It stands uncontradicted in evidence, that in taking this note, which was for an antecedent demand on two other notes for a certain quantity of wheat, the legal interest was reserved, and according to the agreement and computation of the plaintiff and defendant, the sum of ten shillings was added to the note, for the forbearance of about £19, an indefinite time, or rather during the pleasure of the plaintiff, the note being payable on demand. This is so much over and above the legal interest and was demanded by the plaintiff as a consideration for present forbearance.

It has been contended by the plaintiff's counsel, that there can be

no usury, unless it be on an original contract—that the statute does not extend to a note or other security, given for an antecedent debt, as the renewal of a note, &c. Were this construction to prevail, the statute would always be evaded. There certainly may be a loan of money or other things already due, as well as of money advanced at the time; and if there be any moral turpitude in taking usury in any case, the turpitude is of a deeper dye, in the case where advantage is taken of the inability of the debtor to pay an antecedent debt, than in the case where the debtor voluntarily contracts to pay usury for an advance of money.

Chittenden, Adj'd term, 1797.

Carlis *vs.* M'Laughlin

Verdict for defendant.

Richards *vs.* Pearl and Phelps.

If the endorsee of a note not negotiable, commence an action on the note, in the name of the original payee, and in his name obtain judgment and execution, and cause such execution to be levied on personal estate, the property of such personal estate, is by the appraisal vested in the endorsee, and not in the original payee.

But to shew this right in the endorsee, it is necessary for him to produce a copy of the judgment, before he can read in evidence the execution and levy.

Chittenden, June, 1797.

THIS was an action of trespass with force and arms, for that, at ———, on the 16th day of January, 1794, the defendants, with force and arms, took and drove away and converted to their own use, a yoke of oxen and a heifer, the property of the plaintiff, of the value of ———.

Plea—*Not Guilty*.

House, for the plaintiff, stated that in the year 1790, Timothy Pearl, one of the defendants, gave his promissory note to W. Goodrich for £15, which note had been sold and endorsed by William Goodrich, and had through several hands, come *bona fide* to Richards the plaintiff.—That the note being endorsed to the plaintiff, and the equitable property in him, he brought an action against Timothy Pearl, in the name of William Goodrich, as the note was not negotiable.—That judgment was recovered in that action against Timothy Pearl, who well knew that the note was the property of

Chittenden, June, 1797.

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the plaintiff.—That the plaintiff took out execution on that judgment, and caused it to be levied, by a proper officer, on the aforesaid oxen and heifer, then the property of the said Timothy Pearl.—That the property was thereupon legally appraised to satisfy the execution, and delivered to the plaintiff, who had a right to receive them.—That Timothy Pearl took out two writs of attachment against William Goodrich—one in his own name, and one in the name of A. Mansfield, and delivered them to Joseph Phelps, the other defendant, who was then a Constable, and caused the oxen and heifer to be taken from the plaintiff, as the property of William Goodrich.

The sale and endorsement of the note in blank by William Goodrich to W. C. was proved, and that it came, *bona fide*, and for a valuable consideration, to the plaintiff, and that the plaintiff had notified Timothy Pearl, who had proposed several modes of settling the demand with the plaintiff.

Adams, Deputy Sheriff, was produced to prove the levy of the execution on the oxen and heifer, and the execution was also offered in evidence.

D. Chipman, for defendants, objected that the execution alone was not sufficient evidence, and ought not to be read, as it could not appear from the execution alone, that it was issued on a judgment obtained on the note in question.—That to entitle the plaintiff to read the execution in evidence, it was necessary that he should shew the record of the judgment, which might connect the note and execution.

The Court were unanimously of opinion, that the plaintiff, Richards, by virtue of the note and endorsement, had a right to receive payment on the note, or on execution obtained upon it, in the name of William Goodrich.—That the property of the oxen and the heifer, became, on the appraisal, vested in Richards, the owner of the note—not in William Goodrich, the nominal plaintiff. But it could not appear by the execution alone that it issued on a judgment obtained on the note in question. This was a point necessary to be proved, and can be proved by the record only. The record or a copy of it can be had, and this being the best evidence, no other can be admitted.

The cause was continued on terms.

Chittenden, June adj'd term. 1797.

GRAHAM *vs.* GORDON.

The recovery of a judgment in a Court of Record, can in no case be proved by parol evidence.

THIS was an action on the case. The plaintiff stated in his declaration, that the defendant had sold and conveyed to the plaintiff, by deed dated the —— day of ———, a certain lot of land in the South Hero, being Lot No. —— laid to the original right of A. B. containing sixty acres, which deed contained a covenant of warranty.—That afterwards, Stephen Pearl, before the County Court for the County of Chittenden at the term of said Court holden on the —— day of ———, recovered a judgment against the present plaintiff for the same land, in an action of ejectment. Whereupon, the defendant promised the plaintiff, that in consideration the plaintiff would forbear to bring an action against the defendant on the covenants contained in his said deed, he would execute and deliver to the plaintiff his promissory note for the value of the land, at an appraisal to be made, and would indemnify the plaintiff against the bill of cost recovered in the action of ejectment.—That the plaintiff had forborne to bring an action on the covenants contained in said deed.—That defendant had executed and delivered to the plaintiff his note, for the value of the land, but had neglected and refused to pay the bill of cost, whereby the plaintiff had been obliged to pay the same, to the amount of £13, 11*s.* 11*d.*

Plea—*Non Assumpsit.*

The plaintiff produced in evidence the deed of the defendant, as mentioned in the declaration, which contained a limited covenant of warranty.

Witnesses were called to prove the recovery in ejectment against the present plaintiff, by Stephen Pearl—the promise as alleged in the declaration, and that the plaintiff had paid the said bill of cost.

The counsel for the defendant objected to the evidence offered, on the ground that the recovery was the substantial part of the consideration in the case—that it could be proved only by the record, which is the best evidence, and indeed the only evidence which can be admitted.

Chittenden, June adj'd term 1797.

Graham *vs.* Gordon.

Fay, for plaintiff, insisted that the recovery was only matter of inducement; therefore, although it would be mentioned in proving the promise, yet not being a matter of substance, it was not necessary to produce the record of the recovery.

By the Court. The recovery in ejectment is the substance of the consideration, and can be proved by the record only. It comes within the established rule, that the best evidence which the nature of the case will admit must be produced. Indeed, this rule embraces every case, where a party would for any purpose prove the recovery of a judgment.

The cause was continued on terms.

Everts *vs.* Allen.

An action brought for the recovery of a penalty given to a town treasury, not only may, but ought to be brought in the name of the treasury, and not in the name of the person holding the office of treasurer.

In a penal action, nothing can be taken by implication, or aided by intendment; but the plaintiff must shew clearly, that the penalty has accrued, and how it accrued.

Chittenden, adj'd term, June, 1797.

THE declaration and pleadings in this action were as follows: Ira Allen, of Colchester, was summoned to answer, as well to James Everts of Georgia, one of the land-owners of said Georgia, as the treasurer of said town who prosecutes, &c. for this, to wit, that the defendant render unto the said James and the said treasurer, £600, which he owes and unjustly detains for this, to wit, that on the 15th day of November, in the year of our Lord 1791, he the said James, at the dwelling house of B. H. in Georgia aforesaid, demanded of the defendant, who for a long time before was Clerk for the proprietors of the township of Georgia aforesaid, to deliver over to one Reuben Everts of Georgia aforesaid, who then was and still is the legal proprietors' Clerk of the said township of Georgia, all the records, files and papers, belonging to his the defendant's office of proprietors' Clerk as aforesaid. And now the plaintiff saith that the defendant afterwards, to wit, on the 16th day of August, 1792, at Colchester aforesaid, did neglet and refuse to give over to the

said Reuben Everts, proprietors' Clerk aforesaid, all the records, files and papers belonging to his the defendant's office of proprietors' Clerk as aforesaid, and hitherto hath neglected to deliver and give over the said records, files and papers aforesaid for a long time, to wit, from the said 16th day of August, 1792, until the 17th day of August, 1793, being 12 months, against the statute in such case made and provided.—Whereby an action hath accrued, &c. Nevertheless, the defendant, though often requested, hath not rendered, &c.—To the damage of the said James, who prosecutes as well for himself, as for the treasurer of said town of Colchester, £700.—Writ dated Aug. 17, 1793.

D. Chipman and *Miller*, for defendant, demurred to the declaration specially, and assigned the following causes:—

1st.—That it does not appear by the said declaration, that there is any treasury of the town of Georgia, and there is no person named in said declaration as treasurer of said town of Georgia.

2d.—That the plaintiff has declared against the said Ira for the sum of £600 L. M. as forfeited by the above mentioned statute, whereas by the law in such case, no action can be maintained on the statute aforesaid for more than £50 debt as forfeited by said statute, to wit, the penalty for neglecting to deliver over the records as mentioned in said statute for the term of one month.

3d.—That the plaintiff has brought his action against the said Ira for the recovery of £700 damages, and not for the recovery of his pretended debt.

4th.—That it does not appear by the declaration that the said Ira was ever elected proprietors' Clerk by the proprietors of Georgia, nor that the said Ira at the time of said pretended demand, as set forth in the declaration, had in his hands or possession any files, records or papers belonging to the office of proprietors' Clerk of Georgia.

5th.—That the plaintiff's cause of action, if any he have, accrued on the 16th day of December, 1791, and the plaintiff's said action was not commenced within one year from and after that day.

The cause was argued by *D. Chipman* and *Miller* for the defendant, and by *Harrington* and *House* for the plaintiff.

Chipman, Ch. J., delivered the opinion of the Court. Five several exceptions have been taken to the declaration.

Chittenden, June adj'd term, 1797.

Everts vs. Allen.

First.—That it does not appear by the declaration, that there is any treasury of the town of Georgia, and no person is named as treasurer. It has been urged, that it ought to have been averred in the declaration that there was a treasurer of the town of Georgia, for, by the statute, if there be no treasurer in a town, one half of such penalty is given to the county treasurer. But from this provision of the statute, it does not follow that such averment is necessary. It is to be presumed that towns are organized with proper officers, and no averment of that kind is necessary. Had the one half of the penalty been demanded for the county treasury, an averment that there was no treasurer in the town would have been necessary, because this is by way of proviso or exception to the general provision. The town treasury, if there be a treasury, is at all events entitled to the penalty; but the county treasury is entitled only in a particular event—the want of a town treasurer. Nor is there any foundation for the exception, that the name of the town treasurer is not inserted in the writ.

By the act on which this action is brought, one half of the penalty is given to the town treasury. The person holding the office of town treasurer, will receive for the town one half of the penalty if it shall be recovered.

The town treasurer is, with other town officers, chosen annually, and different persons may be chosen for each succeeding year. If it be necessary to commence the suit in the name of the person holding the office of treasurer at the time the suit is commenced, it would seem that the appointment of a different person to the office, while the action is pending, would abate the suit; or it would be necessary to erase the name of the old, and insert the name of the new treasurer, *toties quoties*. We think it the better mode to designate the office only.

The second exception is, that twelve penalties are accumulated in the same action. It is insisted by the defendant's counsel, that for each month's neglect there is a separate and distinct forfeiture which must be separately demanded; or, if it be allowed to demand the forfeitures for several month's neglect in the same action, yet they ought to be demanded in several distinct counts. No authority has been cited directly in point. The question seems not to have been directly decided. The case cited from Blackstone's Re-

ports, 906, is, as far as it has a bearing on the question, an authority for declaring in distinct counts, but we do not think it necessary to decide this point.

The third exception is, that in the conclusion of the declaration, damages only are demanded, omitting the debt—whereas it is said that in penal actions no damages can be recovered, under that name, and so are the authorities. But it may be observed, that the word damages includes costs; and all the precedents of declarations which have been produced conclude in the same manner as the declaration in this case.

The fourth exception is, that it does not appear by the declaration that the defendant was ever appointed proprietors' Clerk of the town of Georgia, or that he had in his hands, any files, records or papers belonging to the office of the proprietors' Clerk of that town. It is averred indeed, loosely, that Ira Allen, a long time before the 15th day of November, 1791, was proprietors' Clerk of the town of Georgia, and that at the time of the demand made, Reuben Everts of said Georgia was legal proprietors' Clerk. It is not stated how Ira Allen came into the office, or how he went out—nor is it necessary. But it is not averred that the defendant had in his hands or possession any files, records or papers belonging to the office of the proprietors' Clerk of Georgia. Such averment is indispensibly necessary. If the defendant had no such files, records or papers in his hands or possession, there could be no right to demand—no neglect, and no penalty could have been incurred. This omission is fatal.

The fifth exception is in effect that the action is barred by the statute of limitations. It is not necessary to decide, whether in a penal action, the defendant can avail himself of the statute of limitations on a demurrer to the declaration. The cause of action does not accrue on the demand, but on the right after the demand. This view of the subject discloses another defect in the declaration, not noticed in the special demurrer, which would alone be fatal.

It is stated that the demand was made on the 15th day of November, 1791; the neglect charged is from the 16th day of August, 1792, to the 17th August,. 1793. The defendant is charged with no neglect during the nine months intervening between the 15th of November, 1791, the day on which the demand was made, and the

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16th of August, 1792. It is not averred that the defendant did not comply during that time. If he was guilty of no neglect during that time, or rather if he complied during that time, no penalty could afterwards accrue. The defendant is charged with neglect in not delivering over the records between the 16th of August, 1792, and the 17th of August, 1793; and it is not stated that the defendant did not at any time after the demand made deliver over the records. Nothing in this, which is a penal action, can be taken by implication, or aided by intendment. The plaintiff must shew clearly that the penalty had accrued, and how it accrued.

Judgment for the defendant.

STATE *vs.* BISHOP.

If a defendant in an action before a Justice of the Peace be indicted for perjury in his testimony, given in support of his book account, exhibited against the plaintiff in the action, and it appear that on a final hearing of the cause before the Justice, the defendant withdrew his book account, so that it could not have been taken into consideration by the Justice in rendering judgment, the plaintiff in such action is a competent witness on trial of the indictment, having no interest in a conviction.

One count is sufficient in such indictment, and may embrace all the particulars in which the respondent swore falsely.

If in such indictment it be stated that the perjury was committed on the trial of the *cause or issue*, it will not vitiate the indictment; nor is it necessary in such indictment to set forth the particular interrogatories which were put to the respondent.

Rutland, June, 1797.

THIS was an indictment for perjury.

Francis Goodrich had brought an action on book against George Bishop before Justice Osgood; on the trial of which, Bishop produced his book, containing certain charges against Goodrich, the plaintiff in the action, and thereupon the interrogatory oath was administered by the Justice to Bishop, and he swore fully and circumstantially to the articles charged on his book, when the Justice's Court was adjourned to a future day.

At the adjourned Court, Goodrich produced witness to disprove that which Bishop had sworn to on the former hearing.—Upon which Bishop withdrew his book, and judgment was rendered by

the Justice in favour of Goodrich for the amount of his demand, without any defence on the part of Bishop.

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State *vs.* Bishop.

This indictment was found against Bishop for perjury in his testimony, which he gave on the first hearing of the cause, in support of his book account which he then produced, and which he withdrew on the subsequent hearing.

Bishop pleaded not guilty to the indictment.

In support of the facts charged in the indictment, the attorney for the State produced Goodrich as a witness.

The counsel for the respondent took exceptions to the competency of the witness, on the ground that he was the person injured by the perjury, if it had been committed, and by the statute would be entitled to treble damages, should Bishop be convicted.

By the Court. Where a person is interested in the conviction as where it may be a mean of reversing a judgment rendered against such person, or of restoring him to something which he may have lost by the perjury, he is not a competent witness. But, if he cannot be a gainer by the conviction, his having been a party to the suit in which the perjury is charged to have been committed, and even his having been in danger of losing by the false oath, is not sufficient to exclude him as a witness.

In the present case, a conviction cannot effect the judgment before the Justice, nor entitle Goodrich to damages; for the judgment was rendered in favour of Goodrich against Bishop, not because the testimony of Bishop was considered to be false, but because Bishop on a final hearing of the cause withdrew his book account, which on the first hearing of the cause he had produced in offset of the plaintiff's demand. There was nothing then before the Court to which the testimony of Bishop related. The objection to the witness in this case goes only to his credibility—not to his competency.

Coodrich was sworn with other witnesses, on whose testimony the Jury found the respondent guilty.

D. Chipman, counsel for the respondent, moved in arrest of judgment for the insufficiency of the indictment, on the following grounds:—

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First.—The respondent is charged in the indictment, containing only one count, with perjury in his testimony, relating to three separate and independent matters.

Secondly.—There is a want of certainty in the indictment. The perjury being charged to have been committed on the trial of the cause *or* issue before the Justice, and in another part of the indictment, on trial *or* in offset to the plaintiff's book.

Thirdly.—The questions to which the answers are said to have been made are not set forth.

It was insisted by the counsel for the respondent, that as the perjury charged to have been committed, related to separate articles of charge on the respondent's book, he could not be charged for the perjury in one count of an indictment, any more than he could be charged in one count with separate and independent crimes.

That if the answers to the interrogations relating to different articles were false, there were so many different perjuries committed.

That this ought the rather to be insisted on in this case, as the statute gives, on conviction, an action for treble damages to the party aggrieved. In this case the Jury might have considered the respondent guilty in one particular only, and yet find him guilty generally: This gives the party aggrieved a right to treble damages for the whole—whereas the right to treble damages ought to be limited to the effects of the perjury, which may not be the case here. Three different perjuries committed on the trials of three different actions might as well be joined in one count.

It was further insisted that the disjunctive *or*, to wit, on trial of the cause or issue, introduced a fatal ambiguity. It left it uncertain whether the oath was administered and the party examined, on the trial of some issue, previous to the auditing of the accounts in dispute, in which case the Justice had no authority to administer an oath to the parties, or whether it was administered on auditing the accounts.

That the same disjunctive *or* in another part of the indictment introduced the same ambiguity, to wit, on trial of the plaintiff's book *or* in offset of defendant's book.

It was further insisted that the indictment should have set forth the questions to which the answers, in which the perjury is charged

to have been committed, were made, that it might be seen whether they related to matters material in the case.

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Spencer and *C. Smith* in support of the indictment. All the perjury committed under the same oath on the same trial or hearing, constitutes but one crime. Different counts are indeed in such case frequently found in the same indictment; but they are inserted for the purpose of varying the statement of the same accusation, that some one count at least may contain a statement of facts as they may appear on trial.

As to the second exception, they contended that there is not that ambiguity which has been insisted on by the counsel for the respondent. If words which are synonymous are coupled by the disjunctive *or*, it is explanatory only—it cannot vitiate. That is the case here. In both instances there is a reference to the whole proceeding on the trial before the Justice, where no particular issue was joined—a case where no particular issue, by law or practice, is ever joined. The expression, *on trial or issue*, relates not to a trial or issue as technically understood in counts of record, but to the whole matters then to be determined.

As to the third exception, they insisted, that the nature of the oath is set forth, and it appears to have been legally administered. That the matters sworn to, in which the perjury is charged to have been committed, are well set forth. To set forth the particular questions to which the respondent made answer, with the manner of their being put, would at least be superfluous.

By the Court. There can be no foundation for the first exception, that the respondent is in one count in the indictment, charged with perjury, in swearing falsely in relation to several separate and distinct facts. This is not a charge of separate and distinct crimes: If it is, there might be so many different prosecutions commenced, and so many distinct punishments inflicted in consequence of a single oath, and false swearing under that oath, which would be new, and even absurd.

Different counts might have been introduced, varying the statement of the testimony of the respondent, to meet the evidence which might be given on trial; and for this purpose only are different counts inserted in an indictment for perjury.

As to the second exception, it is well known in law and practice,

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that no issue, technically speaking, is joined before Justices of the Peace. The cause at large, if we may so say, is at issue, and the Justice proceeds on the whole merits of the case. On the issue, and, on trial of the cause are, as has been well observed, synonymous.—The particle *or* therefore does not in either case introduce any ambiguity.

As to the third exception, that the perjury is charged to have been committed in answering certain interrogatories, and the interrogatories are not set forth: We do not think it necessary in such case to set them forth. Interrogatories are intended to draw out the testimony to the proper points; and it is sufficient, if the answers which are the act of the witness as set forth, appear to be to a point material on the trial.

The respondent takes nothing by his motion.

HASTINGS *vs.* HODGES and PARKER.

Each party has a right to an appeal from a judgment rendered in a County Court, to the next stated or adjourned term of the Supreme Court; and if one party first enter an appeal to the next stated term of the Supreme Court, the opposite party may, notwithstanding, enter an appeal to the next adjourned term of the Supreme Court, and such appeal will be sustained.

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THIS action was brought to this Court by appeal from a judgment rendered by the County Court in March last, entered by the plaintiff to the present adjourned term of this Court.

The defendant moved that the action be dismissed, for that at said County Court, after judgment for the plaintiff in said action, the defendants moved for and were admitted to an appeal to the next stated term of the Supreme Court, to be holden at Rutland on the first Tuesday after the fourth Tuesday of January next. After which the plaintiff moved for and was admitted to an appeal to the present adjourned term of this Court.

It was insisted on the part of the defendant, that although either party may appeal from a judgment rendered by a County Court, to the next stated or adjourned term of the Supreme Court at his op-

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tion, yet if one party first enter an appeal to the next stated term of the Supreme Court, for instance, if the other party would also enter an appeal, he must enter it to the stated term also. That the right of option had attached to the party first appealing, and an appeal ought not to be allowed to the other party to the prejudice of that right, which would be the case if the last appeal might be taken to a different term.

The defendant's counsel also insisted, that an appeal granted to either party, removes the cause from the County Court, so that that Court have no further power over it—not even to grant an appeal to the other party.

On the part of the plaintiff it was contended, that the right of appeal is given to both parties. That there can be no real interference of rights, if both parties enter an appeal, one to the stated term and the other to an adjourned term. Both appeals are to the same tribunal; and the principle thing intended by giving the right of appeal is, that either party aggrieved at a judgment of the County Court may have a right to a trial before the Supreme Court.

The practice once settled, would occasion no surprise to either party—each would know the other's right of appeal, and would take notice of the exercise of that right.

HALL, J. thought that the appeal could not be sustained in this case.

CHIPMAN, Ch. J. It is not questioned that each party has a right to an appeal as the law stands. It was indeed suggested by one of the counsel for the defendant, that by the granting an appeal to either party, by the County Court, the cause is removed, so that the Court can have no further power over it—not even to grant an appeal to the other party. The power of the Court to proceed further in the cause is indeed suspended by the appeal. They cannot grant execution on the judgment, but the cause is not removed—it remains with the Court during the term.

The right of appeal is not confined to the party against whom judgment is rendered by the County Court. The plaintiff, for instance, may have recovered a smaller sum than in justice he ought to recover. This may have been occasioned by the illegal admission or exclusion of evidence, upon which it would be proper that

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he should have the decision of the Supreme Court. It might be for the interest of a defendant to abide by a judgment rendered against him in the County Court; if in such case by taking the first appeal, he can preclude the plaintiff from an appeal, he will leave him no remedy, and drive him to an affirmance of the judgment, or to an action on the recognizance, to recover the amount of the judgment only.

But it is said that if both parties have the right of appeal, which they may exercise in the same cause, yet as he who first appeals gains a prior right, if the other appeal, he must follow that by appealing to the same term of the Supreme Court; that the first appellant has made his election and the other must follow it. This is simply a question of time, which has no relation to the right of justice in the trial. I see nothing of substance in such prior right acquired. If both parties enter an appeal, but one can prosecute to trial: there can be but one record in the case. If one enter and prosecute his appeal in the Supreme Court, the other is discharged from his bond to prosecute If the appellant to the adjourned term fail to prosecute his appeal, the appellant to the stated term may prosecute his appeal; but if the appellant to the adjourned term prosecute, the other is discharged from his appeal, and only relieved from the expense of leading the prosecution, without losing one advantage on the merits or in the mode of trial.

The simple question seems to be, whether the party who after a trial in the County Court, first starts his claim of appeal, shall have a right to postpone the prosecution at his option.

This Court will be inclined to favour prompt justice, yet so that each party shall have a reasonable time to prepare for trial. As to a surprise, if the right become settled, there can be no more danger of a surprise from the second than from the first appeal. Each having the right of appeal the other will be attentive to the exercise of that right. Should there appear to have been a surprise through any secret or unfair practice, it will be in the power of the Court to prevent any injustice on that account. I am therefore of opinion that the appeal in this case ought to be sustained.

Woodbridge, J., concurred, and the cause was on motion continued.

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TOWNSEND *vs.* GRAY.

If A. B. and C. are empowered by act of the Legislature to issue their warrant for the collection of a tax, the power is joint, and must be executed by all.—If two only sign the warrant, it is void.

THIS was an action of ejectment for Lot No. 38, laid to the right of Andrew Wiggins in Hubbardton.

Plea—*The General Issue.*

It appeared on trial that in October, 1787, the Legislature passed an act granting a tax of two cents on each acre of land in Hubbardton, for the purpose of making and repairing roads in said town. By the act granting the tax, J. Sellock, D. Hiecok and J. Whelpley were appointed a committee to lay out the money and superintend the work on the roads, and N. Rumsey was appointed collector of the tax. The act empowered the said Sellock, Hiecok and Whelpley, after the amount of the tax should be expended in labor on the roads, to issue *their warrant under their hands* to the said collector, to collect of the delinquent proprietors of said Hubbardton, respectively, what should remain unpaid of the tax; and empowered the said N. Rumsey, under such warrant, to sell so much of the several delinquent land-owners' lands, as would be sufficient to raise the money remaining unpaid by them respectively on said tax.

A warrant was offered in evidence to said Rumsey collector of said tax, signed by two only of said committee, J. Sellock and D. Hiecok. J. Whelpley, it was said, refused to act on account of some objection to the proceedings at the time.

The counsel for the defendant took exceptions to the evidence, on the ground that the authority to issue the warrant having been given to three without any saving or exception, all must join to render the warrant legal. Two cannot, without the third, legally execute the power. It is like a private authority given to a number of persons to do a certain act, in which case the power is joint, and all must join, unless there be a special provision in the appointment, that a number less than the whole may act. 1 Bac. Ab. 200—201.

The counsel for the plaintiff contended, that the committee in this case resemble a corporation, or an office of a corporation exer-

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cised by several persons, as selectmen of a town, in both which cases, the acts of a majority are valid.

They further contended, that J. Sellock, D. Hiecok and J. Whelpley having been appointed a committee by the Legislature, for the purposes mentioned in the act, their power is of the same nature as that of a committee appointed to report on particular measures during the session of the Legislature—a majority of whom were always deemed sufficient to act.

So where two persons are deputed to make an arrest, one may execute the precept. 1 Strange 117. King against Roe.

By the Court. The act of the Legislature in this case is a private act, although some of the powers given by the act, are regulated by publick statutes. The committee named in the act are not a corporation or *quasi* a corporation. They are joined in a trust with certain powers. Whether these powers can be exercised only by the joint act of the three, must depend on the principles of law in analogous cases.

In corporations, the act of a majority are binding at common Law, unless there be restrictions in the act creating the corporation. The same principles have been extended by custom, or more probably by a derivative right to several persons holding and exercising a right under a corporation, as in the case of selectmen of a town.

As to committees of the Legislature in session, they have no power to act finally. They are appointed to examine, digest and report matters on which the Legislature are to deliberate and decide.—The doings of the committee are merely preparatory, and have no binding force. The authority given by this act in its nature and manner of exercise, resembles a private authority, though given by act of the Legislature, rather than a publick or general authority, or the powers of a corporation, to which indeed it has no resemblance except in the plurality of agents.

The Legislature might have regulated the exercise of the powers given by the act to these three persons, in any manner which they might have deemed expedient. But in the act no word or expression is used, which can take the case out of the common rules of law. By the act, J. Sellock, D. Hiecok and J. Whelpley are empowered to issue their warrant to the collector. It is not said that they, or any two of them shall be empowered to issue their warrant. It will

be found that the Legislature have understood this matter in the same light. They have not considered that acts of commissioners, trustees, &c. are valid, unless performed by the whole number, without special provision for the purpose. Such provisions have been made in several cases where it was deemed necessary or expedient. As in the case of trustees of town schools, in the act appointing commissioners to negociate with the State of New-York; and the act for the partition of lands, in the last paragraph, has the same provision.

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In the execution of an authority or trust of this nature, there are good reasons why all the persons appointed should join in the execution of their powers. For although it may sometimes occasion embarrassment, yet it gives an additional security against mistakes and frauds.

Where several are appointed referees by rule of Court, or arbitrators appointed by the parties, the law is settled that all must join, unless it be otherwise provided by the rule of Court, or by the submission.

The case of an arrest by one, where two had been deputed, is treated in the books as an exception to the general rule, for the sake of publick justice, in the execution of legal process, and has no application to the present case. The warrant therefore cannot be admitted in evidence.

Verdict for defendant.

STATE *vs.* JOHNSON.

An indictment or information charging that the respondent is a common cheat, and that he did by divers false pretences and false tokens deceive and defraud divers good citizens of this State, no particular fraudulent act being specified, is not sufficient.

THIS was an information against Johnson, charging that the said Johnson on the —— day of ———, was a common cheat, not following any lawful business. That he did by divers false pretences, and divers false tokens, cheat and defraud the good people of this State.

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To this information there was a demurrer.

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State *vs.* Johnson.

Cephas Smith, for the respondent, took the following exceptions to the information :—

1st.—That the information contains no direct charge of a crime.

2d.—That the information charges the respondent with no particular fraudulent acts, and of course he cannot know how to prepare his defence.

Johnson is said to be a common cheat, but it is not alleged that at any particular time he cheated or defrauded any particular person; nor are any particular facts alleged which is necessary in an information for any fraudulent practice.—He cited 3 Salkild 186. Rex against Knights.—A charge that the respondent, being lately receiver, &c. did falsely indorse certain exchequer bills, in *deceptioni regis*—held too general—same 188. Rex against Stonehouse—for that she intending to deprive A. of certain sums of money, did falsely accuse him of felony in robbing her, &c.—held bad because not laid as a conspiracy.—2 Strange 1346. Rex against Cooper.—She was charged with being a common brawler—sowing discord, &c. held too general—2 Strange 1346. Rex against Taylor—for being a common disturber of the peace, and for abusing J. A. with opprobrious language in his own house—held too general—2 Str. 999. Rex against Robe.—for several extortions particularly set forth, and generally for suffering his servants to extort divers sums from sundry persons, under pretence of regulating weights and measures. The Jury found the respondent not guilty of the particular charges, and guilty of the general charges.—Held that the general charges cannot be supported even after verdict.

By the Court. Frauds are indictable, but the particular acts must be set forth, and they must be such as common prudence cannot guard against. This information cannot be supported.

General charges are allowed in two cases only—that of a common scold, and that of a common barrator. In all other cases it has been laid down as a rule, that the facts constituting the crime must be set forth so definitely that the Court can see what the crime is.

Judgment that the information is insufficient.

Rutland,
July adj'd
term, 1797.

North *vs.* Johnson.

The condition of an arbitration bond in the following words—"Now if the said L J. shall make his appearance before said arbitrators by himself or attorney, on the day aforesaid, and shall fully pay and discharge all such sums of money as said arbitrators shall award." contains two independent stipulations: first, that the obligor shall appear before the arbitrators—and secondly, that he will pay such sum as shall be awarded against him. And the appearance of the said L J. being in its nature precedent to an award, a plea of no award is insufficient.

THIS was an action of debt on bond in the penal sum of £150, dated November 2, 1792. On Oyer the condition was set forth in substance as follows:—Whereas certain matters of dispute and controversy have existed between us, we have referred them to the arbitrament and final determination of A. B. and C. to be heard at ——— on the third Tuesday of July next, or such other day as the arbitrators shall appoint. Now if the said L. J. shall make his appearance before said arbitrators by himself or attorney, on the day aforesaid, or such other day as the arbitrators shall appoint, and shall well and truly pay and discharge all such sum or sums of money as such arbitrators shall award, then said bond to be void, &c.

Plea—*No Award.*

To which the plaintiff demurred.

D. Chipman, in support of the demurrer, contended that the plea did not cover the condition of the bond—that the condition of the bond consisted of two parts: first, that Johnson should appear before the arbitrators by himself or attorney—and secondly, that he should pay such sum as said arbitrators should award. That the defendant should appear before the arbitrators by himself or attorney was a condition lawful and possible, and in its nature and order precedent to an award: This part of the condition therefore should have been answered.

Cephas Smith for defendant. This is an arbitration bond, tho' differing in some respects from the common form. Arbitration bonds do not bind from the delivery, but from the award made; or rather are voidable, if no award be made. The arbitrators in this case had sufficient authority to proceed to make an award exparte, if Johnson did not appear by himself or attorney. His appearance

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therefore is not in the nature of a condition precedent on his part; and as it does not appear by the pleadings that any award has been made, the plea of no award is a bar to the plaintiff's action.

By the Court. The defendant has stipulated to perform two things on his part, a failure in either of which is a forfeiture of the bond—one is, that he should appear by himself or attorney before the arbitrators; the other is, that he should pay such sum as should be awarded against him.

The appearance of the defendant before the arbitrators, is, as has been justly observed, in its nature and its order, antecedent to the making of an award.—It was a thing lawful and possible, which the parties had a right to make a condition.

There are cases in which the defendant may plead performance or in avoidance generally: in such case the plaintiff must in his replication set forth a breach. To a plea of no award the plaintiff may reply an award and set forth a breach in the non-performance; but the plea of no award is not a plea of performance, but in avoidance—there being nothing laid upon him to perform. Now where a defendant would excuse himself or avoid the charge contained in the declaration, his plea must answer all the allegations contained in the declaration, as fully as in a plea of performance.

It is true that the arbitrators might be authorized to proceed and make an award *ex parte*, or they might be restrained by the submission. This does not affect the present question. Had the plaintiff replied to the defendant's plea, and instead of sitting forth an award and a breach in a non-performance on the part of the defendant, had plead the non-appearance of Johnson, it would not have been an answer to the plea; it certainly would not, if as insisted by the defendant's counsel, the arbitrators might have proceeded *ex parte*. The defendant therefore should have averred a performance of that part of the condition the performance of which is not excused or avoided.

Judgment for the plaintiff.

Rutland, July adj'd term, 1797.

HITCOCK *vs.* HITCOCK.

Magistrates have at common law no authority to take security by way of recognizance for the prosecution of suits. If therefore such recognizance be taken by a Magistrate, not being authorised by statute to take it, it is void and the suit will abate in all cases where the law requires security to be taken for the prosecution.

THE writ of *Audita Querela* in this case, which was originally brought before the County Court, was signed by Samuel Williams, Ch. J. and S. Safford Assist. J. of the County Court. The recognizance was certified as taken before S. Williams only, and was in fact taken in the absence of the other Judge.*

This matter was pleaded in abatement in the Court below, and the Court rendered judgment that the writ abate. The plaintiff entered an appeal, and in this Court the defendant relied on the same plea.

Langdon for the defendant. The allowing of this writ by two Judges of the County Court is by statute; and it must be allowed in the manner pointed out by statute, or it is void.

The statute requires that writs of *Audita Querela*, returnable before the County Court, shall be allowed and signed by two Judges of the County Court, and that surety shall be taken by the Judges allowing the writ. Here two Judges have signed the writ, and but one Judge took the recognizance, as appears by a certificate of the recognizance annexed. He cited the case—Treasurer of the State against Downer—in this Court as in point. The case was this:—A. had been ordered by a Justice of the Peace to find sureties for his appearance before the Supreme Court on a complaint for ——. For want of sureties he was committed to the common gaol in Rutland.—He was afterwards let to bail by a Justice of the Peace, who took a recognizance of the said A. as principal, and Downer as surety, for the appearance of the said A. before the Supreme Court. A. made default, and a suit was brought against Downer on the recognizance. The power of bailing in such case is by statute given to a Judge of the Supreme or County Court. The Court decided, that as the power of bailing in that case was given by statute, and as it did not authorise a Justice of the Peace to take a recognizance

* By a subsequent statute, one Judge is authorised to take such recognizance.

I stated this fact without any doubt of its correctness at the time, and, certainly, not from an impression that a support of the Nisi Prius system required an incorrect statement of facts.

I stated the fact from a general impression which I had of its truth, from a recollection that during the continuance of the Nisi Prius system, the Court generally had sufficient time to do all the business in the different Counties, and that this has seldom been the case under the present system.

I did not at the time advert to the circumstance, that under the law of 1820, giving original jurisdiction to the Supreme Court, a great number of actions were commenced, which were continued of course, and stood for trial at the commencement of the year 1822, when the present system went into operation; by reason of which the dockets were unusually large—in most of the Counties, larger than they have been since.

Windham,
August,
1797.

BADGER *vs.* WILLIAMS.

If the suppression of evidence, in a criminal prosecution, constitute any part of the consideration of a contract, such contract is void.

THIS was an action of *assumpsit* on a promissory note given by the defendant to the plaintiff for the sum of £29, dated September 5, 1794.

Plea—*Non Assumpsit.*

Paine, for the defendant, stated in defence, that before the execution of the note, the plaintiff's daughter had sworn a rape on the defendant's son, who was under bonds for trial before the Supreme Court.—That an action of trespass had been commenced against the son for the injury. A proposal was made for settling the private injury for which the action had been commenced against the son; and it was finally agreed that the daughter should not appear to give evidence on the criminal prosecution against the son, and that the defendant should secure to the plaintiff fifty pounds in satisfaction of the injury.—Accordingly, the defendant, to make a settlement for his son, gave the note on which this action is brought, and one other note, amounting in the whole to fifty pounds; and the plaintiff executed at the same time, and as part of the same settlement a bond to the defendant in the penal sum of £100, conditioned that the daughter should not appear to give evidence against the defendant's son, in said criminal prosecution before the Supreme Court.

It appeared in evidence that the plaintiff came to the house of the defendant for the purpose of making a settlement of the matter before stated; and both parties stated before the witnesses that they had made a settlement.—That the defendant, for the injury done by his son to the plaintiff's daughter, gave his notes to the plaintiff, and that plaintiff agreed that his daughter should not appear before the Supreme Court to give evidence against the defendant's son, and that he agreed to give the defendant a bond conditioned to that effect.—That the defendant said he would not sign the notes unless the plaintiff would give the bond.—That the notes and bond were executed accordingly.—That the note on which the present action is brought is one of the notes thus executed.

Windham, August, 1797.

Badger *vs.* Williams.

Bradley, for the plaintiff, contended that there was no connection between the note and the bond.—That the notes were given for the injury done to the daughter—a lawful consideration; the bond was given on a separate consideration, and was void, as the consideration was illegal. But that cannot effect the notes given on a legal consideration, as a compensation for so atrocious an injury.

Paine, for the defendant, contended that however just the compensation for the injury might be, yet, that was not the whole consideration in this case—one part of the consideration was to acquit the son from a criminal prosecution then pending against him, by suppressing the evidence of the plaintiff's daughter against him. The defendant would not sign the notes but on that consideration; and to induce the defendant to sign, the plaintiff executed the bond. This infects the whole transaction.

CHIPMAN, Ch. J. gave the following charge to the Jury: There are, in this case, two questions—one of fact, and the other of law.—The question of fact for the Jury to decide is, whether the two notes given by the defendant to the plaintiff of which the note in question is one, and the bond, which was at the same time executed by the plaintiff to the defendant, were parts of the same transaction mutually connected; or in other words, whether the bond was in whole or in part a leading consideration or inducement to the defendant in giving the notes.

After stating the evidence in the case, he observed—It is difficult to disconnect the notes and the bond even in idea.—They were made at the same time, between the same parties, and relative to, and for the settlement of the same matters. Though the plaintiff said that the notes must be paid although his daughter should appear as a witness against the defendant's son, yet the defendant would not sign the notes but on condition that the plaintiff would execute the bond; and the bond was executed, and the notes were signed. The execution of the bond then by the plaintiff was a part of the mutual compromise then made; and must, under the circumstances of a pending prosecution for a most enormous crime against the defendant's son, have been a most powerful inducement to the defendant to sign the notes. If the fact be so, the law on this point is clear. The suppression of evidence in criminal prosecutions is clearly criminal; it is an indictable offence. An agreement to sup-

press evidence in a criminal prosecution is an agreement to commit a crime which deeply effects publick justice, and the peace and good order of the community. An illegal consideration effects every part of a contract, with which it is connected, and renders it void. It is so even when it effects innocent persons, who happen to be interested in such contract—much more is it so, between the parties who have made the commission of a crime the consideration of such contract. This, if we may trust the evidence which has been given, (and the material facts have not been contested) is the case with the present plaintiff.

Windham, August, 1797.

Badger vs. Williams.

Verdict for the defendant.

Farnsworth *vs.* Converse and others.

The levy of an execution on real estate is not within the statute to prevent fraudulent speculations and sales of choses in action, passed the 28th day of October, 1807, and such levy is not rendered void by the possession of a third person holding adversely to the debtor at the time of the levy.

THIS was an action of ejectment for 11 acres of land in the town of Fairfax.

Franklin, December, 1813.

Plea—*The General Issue.*

On trial the plaintiff proved that on the the 29th day of August, 1809, the legal title to the land in question was in Levi House; and that on the same 29th day of August, he, the plaintiff, caused an execution in his favour against Levi House to be duly levied on the same land, which had not been redeemed. It further appeared in evidence, that the judgment on which the execution issued was rendered by confession before a Justice of the Peace, and that the defendants, at the time of the judgment, were in possession of the premises, holding the same adversely to Levi House the debtor, and that they so continued in possession when the execution was levied.

Van Ness, for the defendant, insisted that the levy of the execution was within the statute to prevent fraudulent speculations and sales of choses in action, passed the 28th day of October, 1807.—That, as the judgment was rendered by confession, it must be un-

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derstood as a mode of conveyance agreed upon between the parties. The statute extends to all bargains, sales, deeds, leases and other conveyances, and declares them in all cases of an actual adverse possession at the time of such conveyance to be null and void.—That as the statute was made for the prevention of frauds, it ought to be construed liberally as it respects the remedy. It was intended to prevent a title, in the situation described, from passing by the act of the parties or either of them. An execution levied on lands is a conveyance no less than a fine or recovery in the English Law. The statute extends to every mode of conveying land except by descent, whether it be by act of the parties or operation of law. It extends to a devise—to a conveyance by an administrator, though made under an order by a Judge of Probate. Such from the generality of the expression made use of in the statute, was clearly the intention of the Legislature; and Courts will not countenance evasions, but give the statute its full effect. He therefore offered to introduce evidence to prove that in this case it was in fact a mode of conveyance agreed upon between the plaintiff and Levi House, with a view of evading the statute.

Aldis and *Turner*, for the plaintiff, insisted that the statute was in derogation of common right, and not to be extended beyond the letter.—That the language of the act extended only to conveyances made by the voluntary act of the vendor or grantor, and does not extend to creditors levying executions on lands of their debtors. But if it do extend to such cases, all such levies are void without any reference to the origin of the debt or the intention of the parties. But the statute does not extend to any transmission of title by operation or compulsion of law. It could not have been the intention of the Legislature to lock up against creditors all the lands of their debtors of which third persons might have obtained possession without right.

By the Court. This case is not within the statute. The statute extends only to conveyances by the act of the party, from whom the title is intended to pass—the grantor, vendor, or lessor. The estate passes at the election of the creditor by operation of law. The statute is to be considered as a positive law, and is not to be extended beyond the plain import of the words. But if it will admit of an equitable construction, surely a tortious possessor can have

very little equity against the honest creditor of the rightful owner. It cannot be permitted to go into an inquiry whether the debtor consented to the levy, for the purpose of making him *quasi* a vendor or grantor; and it would be too much to say, that all the lands of a debtor, of which, however good his title, there may be an adverse possession, are to remain locked up against his creditors until he shall be able or willing to liberate them. There might rather seem to be some reason for limiting the act, in its construction, so as to exempt from its operation all conveyancés made by order of law, as in case of commissioners under an act of insolvency, and of an administrator under an order of a Judge of Probate.

Franklin, December, 1813.

Farnsworth vs. Converse.

The evidence was rejected.

Verdict for the plaintiff.

Ellithorp *vs.* Dewing.

Actual seizin is a sufficient title for a plaintiff in ejectment to recover against a stranger, that is, against a person who has without right trespassed upon the prior occupancy of the plaintiff.

A mortgagor in possession can do no act which will effect the title of the mortgagee.

THIS was an action of ejectment for 12 acres of land in the town of Sheldon. Ellithorp, the plaintiff, in the spring of the year 1793, purchased of S. B. Sheldon the North half of Lot No. 51, laid for a 200 acre Lot in Sheldon, and went into possession, which possession was continued down. One Phelps at the same time agreed with S. B. Sheldon for the North half of the same Lot, and went into possession, and being so in possession, agreed with the plaintiff to divide the Lot with him, by a line drawn from East to West through the centre of the Lot between the North and South lines. The dividing line was accordingly run in the same year, 1793—and so the plaintiff had always claimed and possessed until some time in the year 1807.

Franklin, December, 1813.

Phelps, after having made some improvements on the North half of the Lot, gave up his bargain with Sheldon, and, in the year 1797, Sheldon bargained the same to the defendant, who went into pos-

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session, and has since occupied and improved the same, but received no deed of the same until April, 1807, when it having been discovered that said Lot No. 51 contained more than 200 acres by reason of a mistake in the original survey, it being laid 20 rods wider on the South line than on the North line, so that each half as divided in the year 1793 contained more than one hundred acres; but the South part was the largest. And sheldon conveyed to the defendant, Dewing, by metes and bounds, one half of said Lot No. 51, which included the gore of land in dispute, South of the line formerly run for a division. It did not appear that Sheldon ever held a title to the said lot.

Van Ness and *Marvin*, for the defendant, urged that the defendant might claim the benefit of the statute of limitations from the possession of Phelps in the year 1793, and further that as the plaintiff and defendant both derived their title from the same source, they could not question each other's title; and certainly if the defendant cannot defend on this principle, neither can the plaintiff recover on the same principle: and having shewn no title to the land in question, is not entitled to recover against the defendant.

By the Court. From the evidence in the case, the plaintiff, and not the defendant and those under whom he claims, has been in possession and occupancy of the land in question, from the running of the division line in the year 1793, and although both parties derive their title by purchase from Sheldon, there is yet no more privity between them, than there would have been had their several purchases been of different tracts in different parts of the state. In this case then, the defendant is not estopped from denying the plaintiff's title, as in a case where the plaintiff and defendant both derive their title from one common source—nor has the plaintiff shewn a title derived from an original source—nor is it necessary in all cases for a plaintiff in ejectment to derive his title from an original source, nor to shew a title by the statute of limitations. Actual seizin is sufficient to recover as well as to defend against a stranger to the title. He who is first seized may recover or defend against any one except him who has a paramount title. If disseized by a stranger, he may maintain an action of ejectment against the disseizor, and in like manner the disseizor may maintain an action

against all persons except his disseizee or some one having a paramount title.

It further appeared that on the 21st day of July, 1807, the plaintiff had sold the South half of said Lot No. 51 as he had claimed it, to Silas Whitney, and had taken a mortgage back to secure the payment to be made on the first day of July, 1808.—That Whitney went into possession, and having failed of making payment on the 16th day of August, 1808, he released the mortgaged premises, and surrendered the possession to the plaintiff.—That in the summer of the year 1807, Whitney, while in possession, had by agreement with the defendant, yielded to him the land in dispute, and permitted the fence to be removed accordingly.

It was insisted by the counsel for the defendant, that Whitney, having while in posseesion, although a mortgagor, surrendered the premises in dispute to the defendant, it must be considered as an amicable settlement of the boundaries which was binding on the plaintiff. And further, that the deed of release from Whitney to the plaintiff, having been made while the defendant was in possession of the premises, claiming adverse both to Whitney and the plaintiff, was void, being within the act of October, 1807, to prevent fraudulent speculations and sales of choses in action.

By the Court. A mortgagor cannot effectually surrender or pass any right of the mortgagee in the premises. A release of the equity of redemption to the mortgagee in whom is the legal title is not within the act referred to. Beside, it is not necessary to shew the release. The condition of the mortgage having been broken, the plaintiff's claim is not founded on the release, but on the original mortgage deed which was made previous to the defendant's possession. The release is of an equitable right only—it adds nothing to the plaintiff's legal title.

Verdict for the plaintiff.

Franklin, December, 1813.

BOWDISH *vs.* PECKHAM.

The statute allowing special matter to be given in evidence under the general issue dispenses with the form only—not the substance of a plea in bar; and it is necessary in such notice, to state the facts relied on as particularly as in a plea in bar.

THIS was an action for slanderous words spoken by the defendant concerning the plaintiff.

Plea—the *General Issue*, with notice that the defendant would, on the trial, give in evidence the truth of the words alledged in the plaintiff's declaration to have been spoken by the defendant.

The plaintiff having proved the speaking of the words by the defendant as alledged in the declaration,

Swift, for the defendant, stated that he should defend under the notice agreeably to the statute, by proving that the words charged to have been spoken by the defendant of and concerning the plaintiff were true, and offered evidence to prove that in an action on Book between the plaintiff and defendant, the plaintiff had sworn to a false account by him produced in that action.

Van Ness, for the plaintiff, objected to the admission of the evidence under the notice. In an action for slanderous words, the truth of the words spoken cannot be given in evidence under the general issue. It must be pleaded specially. The notice allowed by the statute is in the place of a plea in bar; and in such notice the facts relied on by the defendant must be set forth as particularly as in a plea in bar. The plaintiff must have notice of the facts intended to be proved, that he may come prepared to answer them. 1 *Term. Rep.* 748. *Johnson* v. *Stewart*.

Swift and *Marvin* for the plaintiff. The notice is with a reference to the words charged to have been spoken sufficiently particular, the notice is as particular as the declaration.

By the Court. The notice ought to be as particular as a special plea in bar. The statute by allowing notice of special matter to be given in evidence under the general issue, dispenses with the form only—not the substance of a special plea. The plaintiff must by the notice, be informed of the facts intended to be proved, otherwise,

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he may be surprised on trial by the proof of facts which with proper notice he might have satisfactorily explained or contradicted. He cannot be expected to come prepared to explain or justify every transaction of his life, which, however, will be necessary if such notice as this be deemed sufficient. The case Johnson *v.* Stewart, cited by the plaintiff's counsel, was an action for the publication of a libel. The rules of pleading in actions for libels and actions for words are the same. In that case the libel had charged the plaintiff generally with being concerned with a nest of notorious swindlers, of whom the plaintiff, Johnson, was the head. The defendant pleaded in justification that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding sundry persons, with whom he had had dealings and transactions, wherefore he printed, &c. To this plea there was a demurrer. The Court in that case held the plea to be bad as being too general. The plea was indeed as particular as the charge in the declaration, but that was the charge of the defendant which the plaintiff was bound to state as it was made. But a defendant cannot justify in so general a manner.—He must state the facts on which he relies for a justification, that the plaintiff may come prepared for trial. It is true that our statute intended an ease to the defendant, but it is the duty of the Court to take care that this ease to the defendant shall not be turned into a surprise to the plaintiff. No evidence therefore can be admitted under this notice.

Swift, for the defendant, offered the same evidence in mitigation of damages.

By the Court. The evidence cannot be received in mitigation of damages. You may give evidence of the general character of the plaintiff, which it must be presumed he has come prepared to support.

Verdict for the plaintiff.

After verdict, *Swift* and *Marvin* moved in arrest of judgment for the insufficiency of the declaration.

The words charged in the first count were—"Joseph Bowdish

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(meaning the plaintiff) has made out a false account against me, (meaning the defendant) and sworn to it, and he (meaning the defendant) could prove it."

In the second count, the words were charged to have been spoken as follows—"He, Joseph Bowdish, (meaning the plaintiff) has made out a false account against me, (meaning the defendant) well knowing the account to be false, and sworn to it, and he (meaning the defendant) could prove it."

It was insisted in support of the motion, that the words as charged in the declaration were not actionable—that they did not necessarily import the crime of perjury, especially as there was no colloquium of any Court or magistrate before whom the account had been sworn to, or of any cause or occasion of taking the oath. But admitting the words to be actionable, yet it was insisted that there was an inconsistency running through the whole declaration. After setting forth the words of charge in the first person, each count concludes thus—"and he (meaning the defendant) could prove it." In grammatical construction it is an assertion of the plaintiff that he, the defendant, could prove the charge to be true.

For the plaintiff it was insisted that the words clearly imported a charge of perjury, and would be so understood by all who heard them; and that although there was in setting forth the words a change of persons, the first to the third, yet it was clear that the defendant was meant in both persons, and so was the averment.

By the Court. The words in common understanding clearly import a charge of perjury—perhaps not conclusively. Had they have been introduced with a proper colloquium, it might have been put out of all question. In taking the second exception, the defendant's counsel are correct in their construction of the declaration. The third person *he* clearly means the defendant, as well as *I* preceding in the first person; but in the one case he is the person speaking—in the other, spoken of; the person of whom some one makes the assertion, "he can prove it." In strictness the defendant does not make the assertion of himself, whatever the pleader intended. He has put the assertion into the mouth of the plaintiff, who is speaking in the declaration. It is undoubtedly a mistake; but it is now a fatal one, and the judgment must be arrested.

Swift, for the defendant, moved to be allowed costs.

By the Court. Costs are not to be taxed in such case by any statute, nor by the common law, nor can costs be taxed for the defendant on any principle of justice. Had the defendant demurred to the declaration, he would have been entitled to cost; but since he has put the plaintiff to the expense of a trial, and the merits have been found against him, it would be as unjust as illegal to allow him costs.

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WELLS and others *vs.* BREWSTER.

A person not being a proprietor in a town, cannot be permitted to call in question the legality of a proprietary division of such town; nor will a proprietor be permitted to do so unless it appear that his rights have been violated by such division; nor even in that case, if he shall have submitted to, and acquiesced in the division made.

Franklin, December, 1813.

THIS was a writ of error brought to reverse a judgment of the County Court in an action of ejectment for 100 acres of land in Georgia, in which Anna Brewster, administratrix of Charles Brewster, was plaintiff, and Samuel Wells, Orange Wells, and Lewi Stiles defendants. The Jury in the Court below found a special verdict which was in substance—That the intestate at the time of his decease, was seized in fee of one hundred acres of land in the town of Georgia, conveyed to him before the proprietary division of the township by Ira Allen, the rightful owner of several proprietor's shares in said town, among others the right of Selah Beeman, which hundred acres so conveyed to said Charles Brewster, was bounded in the deed of conveyance in the same place where Lot No. 73, the land demanded now lies.—That at a proprietors' meeting of said town of Georgia, held for the purpose of making a division of the lands in said town, among the proprietors, Lot No. 73, was voted to said Charles Brewster in his life-time as a settler in lieu of his draft on the right of Selah Beeman.—That one of the defendants below, Lewis Stiles, was in possession of the Lot at the time of the vote, and had made some improvements thereon under Samuel Wells, father of the two other defendants, under whom he now held as tenant, but owned nothing as a proprietor in the

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town.—That Samuel Wells and Orange Wells were owners of two proprietor's shares in the town which they derived from their father.—That in the division aforesaid, Samuel Wells and Orange Wells refused to have the said Lot No. 73 voted to them in lieu of their draft, and that other lands were divided to them in other parts of the town in full of their rights.

Swift, for the plaintiff in error. A plaintiff in ejectment to enable him to recover must make out a clear title. It does not appear by the special verdict that the plaintiff below had any title to the land demanded. It does indeed appear that Ira Allen owned the right of Selah Beeman in Georgia, and that he conveyed to Charles Brewster the Lot in question as a part of that right; but the Lot in question had never been divided or set to that right. After the purchase of the Lot by Charles Brewster, the proprietors of Georgia made a division of the town, and voted the Lot in question to Charles Brewster in lieu of his draft, under that section of the act regulating proprietors' meetings authorising the proprietors to vote to a settler the Lot on which he lives in lieu of his draft. But it is not found that Charles Brewster, the intestate, was a settler on the Lot in question, which was voted to be set to him by the proprietors; on the contrary it is found that Lewis Stiles, one of the defendants below, was settled on the Lot under Samuel Wells, father of the two other defendants. So that the statute which empowers proprietors, in making a division, to vote to settlers the Lots on which they have settled, in lieu of their draft, did not authorise the vote in question. The Lot was in possession, not of the intestate, but of Lewis Stiles, or rather of Samuel Wells the father, under whom the other two defendants below, claim as owners of his rights or shares in the town of Georgia. To them the Lot might have been voted, but to no other person. There is therefore no title to the Lot in question found in te intestate—consequently, judgment should have been rendered on the special verdict for the defendants below.

Van Ness, for the defendant in error. Admit that the Lot in question was not legally severed to the right of Selah Beeman, yet it does not follow, that the division is void to every intent. It is found by the verdict, that there was a division of the lands in the town of Georgia among the proprietors in fact made, and that the Lot in question was by the proprietors set to Charles Brewster on

the right of Selah Beeman, who was found to be the owner of one hundred acres of that right. This has ever been considered a sufficient shewing for a plaintiff in ejectment to recover against a stranger, or a person whose rights have not been violated by the division.

On this principle, neither of the defendants below are entitled to call in question the legality of the division. One of the defendants, Lewis Stiles, was a stranger, having no interest in the town, either in common or in severalty. The other two, Samuel Wells and Orange Wells, although proprietors, refused the Lot in question, and received other lands in the town for their shares in the division. They were not interested, or in any way entitled to call in question the legality of the act of the proprietors in voting this Lot to Charles Brewster. If then, we have not been incorrect in stating the principles by which the decision in this case is to be governed, it follows that the judgment of the Court below is correct and ought to be affirmed.

CHIPMAN, Ch. J. delivered the opinion of the Court. Judge *Farrand* did not give an opinion, having been of counsel in the case.

This case must be decided upon the special verdict, which is very briefly drawn up. The general questions are—1. Is there a sufficient finding to support the judgment rendered for the plaintiff in the Court below?—2. Upon this finding ought the judgment to have been rendered for the defendant?—3. Is the verdict so defective that there ought to have been a *venire de novo?* The verdict first finds a title in the intestate, Charles Brewster, to one hundred acres of land in the township of Georgia, and then states the manner in which the claim of the plaintiff below, administratrix, is made out through the intestate, to the Lot in question, by virtue of that title and a division of lands in Georgia by the proprietors.

The Court are of opinion that there is a sufficient finding to warrant a judgment for the plaintiff below, if the division be found valid, for the defendants, if it be invalid. The Court are also of opinion that a sufficiently valid division is found; certainly against all who are strangers, having no proprietary interest in the town; and even against every proprietor whose rights have not been violated in the very matter in contest.

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Wells et al. *vs.* Brewster.

It has long been decided by the Courts in this State, and the decisions ought never to be disturbed, that no stranger shall be permitted to call in question the legality of a proprietary division; nor shall a proprietor be permitted to do so, unless he can shew his rights to have been violated as before mentioned, nor even in that case, if it shall appear that he has submitted to, and acquiesced in the division made. The question then is, has the verdict found that the defendants below, or either of them, are in a situation, in relation to the Lot in question to contest the validity of the division? Lewis Stiles is found not to have been the owner of any lands in the town; but that he entered into possession of the premises, and made improvements under Samuel Wells, the father of the two defendants, Samuel and Orange Wells. It is not found that Samuel Wells, the father, had any claim or title to this Lot, or to any lands in Georgia, at the time when Stiles went into possession, or at the time of the proprietary division. Therefore, Stiles can have no right, either for himself or for Samuel Wells, the father, to contest the legality of the division in this case.

Samuel and Orange Wells, the two other defendants below, were not strangers, destitute of interest in the division; for it is expressly found by the verdict, that they were the owners of two rights or shares in Georgia, in the right of their father. It is not stated how they became owners, or how they acquired their father's title, or whether the father was living or dead. But to make any good sense of it, we must understand that they were owners of the rights by a title derived from or through their father—whether by descent or purchase is immaterial. It is further found, that in the proprietary division, Samuel and Orange Wells, the sons, refused to have any lands voted to them in lieu of their drafts, on their rights. This, could they have claimed a right to such vote for this Lot, was clearly an abandonment of such claim. But it does not appear that they had derived from their father any title or claim to the possession or improvements made by Stiles. And it is found that they, in the division of the town, received other lands to the full amount of their two rights or shares. They have therefore, according to the principle laid down, no right in this case to contest the legality of the division, or to contend that the Lot in question was not well severed to Charles Brewster, the intestate.

The consequence is, that the judgment of the County Court must be affirmed. *Franklin, December, 1813.*

BAILEY *vs.* KIMBAL and others.

If two or more debtors be committed to gaol on execution, and give a gaol bond for the liberties of the prison, and the creditor discharge one of them from prison, whether before or after the other debtors have escaped from prison, it is a discharge of the debt as against all.

THIS was an action of debt on a gaol bond assigned to the plaintiff by the Sheriff of Franklin County; given for the admission of Stephen Kimbal and Jesse Kimbal to the libetries of the prison in St. Albans. The plaintiff declares, that on the 14th day of January, 1811, before Jacob Smith, Justice of the Peace, he, the plaintiff, recovered judgment against Jesse Kimbal and Stephen Kimbal for the sum of £47 3*s*. 3*d*. damages, & for the sum of £2 4*s*. 7*d*. costs. That on the same day he took out an execution on that judgment, and caused the said Jesse and Stephen to be thereon committed to the common gaol in St. Albans. That for the admission of the said Jesse and Stephen to the liberties of the said prison, the defendants executed the bond to the Sheriff, conditioned in common form.—That afterwards, on the 20th day of February, 1811, Jesse Kimbal escaped from the liberties thereof without having paid said debt, &c.—Whereby the said Sheriff became liable, &c.—And afterwards, on the 14th day of September, 1811, the Sheriff assigned the bond to the plaintiff, concluding in the common form. To this there was a plea in bar by the defendants. Admitting the judgment, execution, commitment, execution and assignment of the bond, they say that, after the making of the said writing obligatory, and while the said Stephen Kimbal was within the liberties of said prison, on the execution aforesaid, without having committed any escape therefrom, to wit, on the 22d day of February, 1811, the said Nathan Bailey did discharge the said Stephen Kimbal from his said imprisonment; and directed the Sheriff and keeper of said prison to discharge and set at liberty the said Stephen from his said imprisonment. By reason whereof, and for no other

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cause, the said Stephen did depart from the said prison and the liberties thereof. To which plea there was a demurrer and joinder.

Van Ness, in support of the demurrer. It stands admitted by the plea, that Jesse Kimbal committed an escape an the 20th day of February, 1811, and that Stephen Kimbal was not discharged by the plaintiff until the 22d day of the same February. By the escape of Jesse Kimbal, the bond became forfeited as to all the signers, and therefore it became immaterial whether Stephen continued within the liberties, committed an escape, or was permitted by the plaintiff to go at large.

Turner and *Marvin*, for the defendants. It is not conceded that Jesse Kimbal escaped before the discharge of Stephen. The time of the escape alledged in the declaration is immaterial. The allegation in the declaration relative to the escape, would have been supported by proof of the escape on any day between the execution and assignment of the bond. No issue could have been taken on the day of the escape. Be that as it may, the discharge of Stephen Kimbal, is a discharge of all the signers of the bond—it is a discharge of the debt. To maintain this action, there must appear a subsisting debt. But it appears that Stephen Kimbal has been discharged from the debt; and in this case, a discharge of one is a discharge of all.

HUBBARD, J. delivered the opinion of the Court.

The questions are—1. Whether the defendant's plea discloses sufficient matter to bar the action?—2. Whether it is sufficiently set forth? Stephen Kimbal, one of the debtors, (the debt being against Stephen and Jesse Kimbal) was on the 22d day of February, 1811, by the creditor discharged from his imprisonment on that debt. A discharge of a debtor from imprisonment by the creditor is virtually a discharge of the debt itself. It is said in the case of Jacques against Withy—1 Ter. R. 557—that there is but one case where a debtor in execution, who obtains his liberty, can afterwards be taken again for the same debt; and that is where he has been guilty of an escape.—The reason why he may be retaken in that case is, because he is not legally out of custody. But where a debtor in prison is discharged from his imprisonment by the creditor, he can

not be retaken; it is a discharge of the debt itself.—Vigers against Aldrich, 4 Bur. 2482. It is therefore immaterial to determine whether the escape of Jesse Kimbal happened before or after the discharge of Stephen. The discharge of Stephen from his imprisonment, being a discharge of the debt, must be good for him, and being so, it must be a discharge of all the defendants.

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In order to maintain an action on a gaol bond like the present, it must appear that there was a subsisting debt at the time the action was brought. In this case the debt having been discharged, there must be judgment for the defendants.

NOTE.—See Whitacres *v.* Hampkinson, Croke Charles 75—where it is said that if there be a judgment against one of two joint obligors, and that one be taken in execution and suffered to go at large by permission of the plaintiff, and the other be afterwards sued on the same obligation, such discharge of the first is a good plea in bar for the latter.

VAN NESS *vs.* FAIRCHILD.

By a plea in bar to a *scire facias* against bail on mesne process, the defendant may avail himself of a release by the plaintiff of his debt against the principal, or a release to himself as bail; but cannot plead in bar, that the plaintiff affirmed to him that the debt against the principal was settled, as a release or discharge; and can avail himself of such affirmation only by pleading that it was made fraudulently, and with intent to charge him wrongfully with the debt of the principal, and that he was thereby prevented from securing the principal in discharge of himself as bail.

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CHIPMAN, Ch. J. delivered the opinion of the Court, first stating the case.

This is a *scire facias* against bail on mesne process, setting forth that the plaintiff, on the 6th day of July, 1810, prayed out a writ of attachment of that date in his favor, against one Philip Goodwin in an action of Book Account, directed to the Sheriff, &c. and made returnable to the County Court then next to be holden at St. Albans on the last Tuesday of August, 1810. And on the same 6th day of July delivered said writ to the Sheriff.—That the Sheriff afterwards, to wit, on the 9th day of August, 1810, by virtue of said writ, took the body of said Philip Goodwin, and on the same 9th day of August aforesaid, the defendant, Fairchild, became

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bail for the said Philip Goodwin, by endorsing his name on the said writ according to the statute in such case made and provided.—That said writ was duly returned and entered in Court, and that such proceedings were thereon had, that at a County Court holden at St. Albans, &c. the said C. P. Van Ness recovered judgment against the said Daniel Fairchild for the sum of $56 39 damages, and for the sum of $17 12 costs.—That execution was issued thereon, delivered to the Sheriff, and a *non est* return thereof made in due time to charge the bail. To this the defendant, the bail, pleaded in bar, that after the commencement of said action against the said Philip Goodwin, by the said C. P. Van Ness, and after the said Daniel Fairchild had endorsed his name on said writ as bail as aforesaid, to wit, on the 11th day of August, 1810, the said C. P. Van Ness executed and delivered to the said Philip Goodwin a receipt in the words and figures following, to wit:—Received, August 11, 1810, of Philip Goodwin, a Note against James Godfrey for forty dollars, dated January 2d, 1807. Now it is agreed and understood, that if the said Godfrey has no offset or defence against this note, so as to prevent the whole from being recovered, or if the said Goodwin shall hereafter do no act which shall prevent the whole from being recovered, or if the said Goodwin shall hereafter do no act which shall prevent me from receiving the whole amount of said note, it is to be in full of all accounts I have against said Goodwin. At the same time, I am not to prosecute my action against said Goodwin until the note against Godfrey is decided. C. P. Van Ness. And the said Daniel Fairchild being about to apprehend the said Goodwin on a warrant upon a bail-piece about to be issued agreeably to the statute, the said Goodwin then produced and delivered to said Fairchild said receipt, and the said C. P. Van Ness then affirmed to the said Fairchild, that said suit was settled and discharged, and that he was no longer holden as bail for the appearance of the said Goodwin. In consequence of which affirmation of the said C. P. Van Ness and discharge as aforesaid, the said Fairchild omitted to arrest the said Goodwin as aforesaid.

To this plea there is a demurrer and joinder.

Every plea in bar must consist of a statement of facts properly connected and legally deduced to a single and sufficient point, sufficient to excuse, discharge or justify the defendant from and against the demand of the plaintiff.

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The undertaking of bail on mesne process is not merely for the appearance of the principal to the plaintiff's writ, but that he, the principal, shall satisfy the judgment which shall be recovered against him, or render his body in execution. In an action like this against the bail, he may discharge himself by shewing a fulfilment of his engagement—that the judgment has been satisfied, or the body of the principal rendered in execution; or he may be exonerated by some delay or neglect of the plaintiff. The bail may also avail himself of a release: The plaintiff's right against the bail is of such a nature that the plaintiff may release it, without effecting his right against the principal. The death of the principal, before the return of the execution in the original action, will excuse the bail.—A surrender of the principal in due time will also exonerate the bail.

On endorsing the original writ, the bail is entitled to a bail-piece, on which he may at any time obtain a warrant to apprehend the body of the principal, and may thereon cause him to be committed to prison, for safe-keeping, that he may have the body to surrender in his own discharge; and the principal shall remain in gaol to that end, unless he procure new bail to the satisfaction of the Sheriff or the plaintiff in the action. Although the statute is silent on the subject, there cannot be a doubt but that such new bail will be a discharge of the original bail. The plea in this case contains no matter sufficient to discharge, excuse, or justify the bail in any of these modes. There is no averment of an actual or eventual discharge or satisfaction of the original demand. The point intended to be relied upon seems to have been the affirmation of Van Ness, the plaintiff in the original action, that his demand against Goodwin, the principal, was settled, and the bail discharged; in consequence of which affirmation, the defendant, the bail, omitted to apprehend and secure the principal. No discharge is alledged—no actual fraud; and the Court are of opinion they cannot infer either. As to fraud, could such plea be available in a Court of Law, in this case there is nothing in the plea from which it can be inferred. The affirmation appears to have been made with a view to the writing set forth, and must be explained and the meaning limited by that. But to examine the plea a little more particularly. The pleader was aware that to this *scire facias* the receipt could not be pleaded as a discharge of the debt against Goodwin.—Whatever might have

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been its effect in the original action, it was now too late. It is a rule that nothing can be pleaded to a *scire facias*, which might have been pleaded to the original action. For this reason, probably the pleader did not attempt to plead the receipt according to its legal operation. Nor is it averred what legal effect it had: it is merely called a receipt, and set forth in *hæc verba*. Afterwards, in the plea, there is a reference to "the said discharge," and "the discharge as aforesaid," referring doubtless to the receipt; although it had not before been named a discharge or introduced as such; nor could it have been with any legal propriety. The plea goes on, "and the said Daniel being about to apprehend the said Goodwin on a warrant upon a bail-piece about to be issued agreeably to the statute," that is, he was about to apprehend Goodwin when he should have obtained a bail-piece—probably to be issued on the writ which he had endorsed, for as to this the plea is silent; and when he had procured a warrant on that bail-piece, this is too loose. What follows as the closing point of the plea is still worse—in consequence of which affirmation of the said Cornelius P. and the discharge aforesaid, the said Daniel omitted to arrest the said Goodwin as aforesaid. But he had not shewn that he had any right or authority to arrest Goodwin. Take it the most favourably, he was only about to procure such authority. He has therefore shewn no more than that he had omitted to do that which he had no right to do, to arrest Goodwin. On what ground, or for what purpose the bail-piece was to be issued, is left to intendment. All reference to the attachment against Goodwin, defendant in the original suit, and the endorsement of that writ by the present defendant as bail for Goodwin, having been here omitted. On the whole, the plea is insufficient both in form and substance. There must therefore be

Judgment for the plaintiff.

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VERMONT STATE BANK *vs.* STODDARD.

A. as principal, and B. and C. as sureties, signed a note payable to the Vermont State Bank. The note was discounted and the money paid to A. the principal. By mistake the note was afterwards given up to A. $250, being unpaid and remaining due on the note.—Held that *indebitatus assumpsit* would lie against A. solely for the said sum of $250.

THIS was an action of general *indebitatus assumpsit*, for money had and received. At the trial a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case.

On the 28th day of April, 1808, John Stoddard, for the purpose of borrowing money of the Vermont State Bank, deposited a note of that date signed by himself principal, and Zerah Willoughby and Newton Hays sureties, by which they jointly and severally promised to pay said Bank, sixty days after date, $250; which said note was discounted; on which Stoddard received from the Bank the amount in money on his own account and to his own use. Afterwards, on the 8th day of June, 1808, the said Stoddard wishing to borrow more money of the Bank, deposited in the Bank another note, signed by himself principal, and Zerah Willoughby and David Stevens sureties, by which they promised to pay said Bank the sum of $650, sixty days from date. The money on this note was also received by Stoddard on his own account and to his own use. Afterwards Stoddard paid to the Bank $650 on the two notes, leaving a balance due the Bank on said notes; but through a mistake, both of said notes were given up to Stoddard, and it was agreed by the parties that if on the foregoing facts, the Court should be of opinion that the plaintiff is entitled to recover.—Judgment to be entered on the verdict, otherwise the verdict to be set aside, and the plaintiff to become nonsuit.

Aldis, for plaintiff.

Marvin and *Swift*, for defendant.

The opinion of the Court was delivered by

HUBBARD, J. The question for the opinion of the Court is, Do the facts above stated, in point of law, support this action of general *indebitatus assumpsit* for money had and received against the present defendant, Stoddard? The action for money had and received

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has been rightly compared to a bill in equity. It is to recover money belonging to the plaintiff in the hands of the defendant, which he in equity and good conscience cannot retain. In this case the defendant received the money of the plaintiff, upon a security since given up by mistake. The money still remains in the hands of the defendant, which he cannot in equity and good conscience retain.

It is objected that the notes given up, on which the money was due, having been signed by others with the defendant, all should have been sued. The plaintiff has no claim either at law or in equity against the sureties, who received no part of the money. In the case. Attorney General *v.* Randal, 2 Eq. C. Ab. 742.—Though a receipt had been signed by three Trustees, yet the Chancellor decreed that the one only who had received the money should be accountable. In the case Stratton *v.* Rastal and others, 2 T. Rep. 366, where an annuity bond granted by two became void by a neglect of the grantee, in not registering a memorial agreeably to the provisions of the statute, the Court held that he could not recover back any part of the consideration, from the one who had signed as security, notwithstanding they had both signed the receipt.

Nor is there any thing in the objection that the action should have been brought on the notes. The notes had been given up, and probably cancelled. It might be difficult, accurately to describe the notes. This action is more convenient for the plaintiff, and not less so to the defendant, than an action or actions on the notes. There are many cases where the action for money had and received will lie, where the contract is in writing; and even where the writing remains in force and in the hands of the plaintiff. It was holden to lie in the case of Farrer *v.* Nightingale, 2 Esp. Rep. 639, for money received under a written contract, which the defendant was unable to perform. In the case of Weaver *v.* Bentley in the Supreme Court in the State of New-York, Cain's Rep. 197, and in a case in the Circuit Court in New-York, where the defendant had failed to perform.

It cannot be objected that the action will not lie for the amount due on the notes delivered up, on the ground that they were not money.—They were payable in money, and money was received by the defendant when the notes were made. This is a stronger case than that of Longchamp *v.* Kenney, Doug. 137.—In that case it was held that this action would lie against a person, who had got

possession of a Masquerade Ticket belonging to the plaintiff, on presumption that he had sold it. In this case it is unnecessary to resort to presumption. It is admitted that the defendant has received the money. There must therefore be

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Judgment on the verdict.

WARNER *vs.* WHEELER.

There are cases where, from the fraud practised by the seller of property, the purchaser, at his option, may rescind, and, by an action of *indebitatus assumpsit*, recover back the purchase money; or by an action of deceit, or some other proper action, recover his damages; but can in no case maintain an action of *indebitatus assumpsit* for the consideration paid, without a previous offer to the seller to rescind, and a demand of the sum paid for the property.

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THIS was an action of *assumpsit* on a contract for an exchange of horses. The declaration stated, that on the twenty-fifth day of November, 1810, at ———, the plaintiff, at the special instance and request of the defendant, delivered to the defendant a certain gray mare, which was well and sound, and of the value of one hundred dollars, and paid the defendant five dollars in cash as boot.—And that the defendant delivered to the plaintiff in exchange, a certain sorrel mare of the defendant, which the defendant then and there warranted and delivered to the plaintiff as being entirely sound and free from any disease or blemish.—That said sorrel mare was at the time of the said warranty and delivery wholly unsound and of no value.—That she had a disease commonly called the consumption, which was well known to the defendant, and wholly unknown to the plaintiff.—That she died of said disease.—Whereby the plaintiff wholly lost the said sum of one hundred dollars the value of his said gray mare, together with the said sum of five dollars so paid as boot as aforesaid. The declaration then proceeded,—"Whereupon the defendant became liable to pay to the plaintiff the said sum,

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being one hundred and five dollars, and, being so liable, did assume" —concluding in the usual form of *indebitatus assumpsit*.

Plea—*The General Issue*.

Aldis, for the plaintiff.

Van Ness, for the defendant.

On trial, the counsel for the defendant insisted that the plaintiff had not supported his action, on the ground that it was in substance an action of *indebitatus assumpsit*, to recover back the price given for the defendant's mare, or, at least, to recover the value of the plaintiff's mare and the sum of five dollars paid by the plaintiff as boot money, and could not be maintained unless the plaintiff had a right to rescind, and had in due season offered to the defendant to rescind, and to return to him what he had received.

The Court overruled the objection, with liberty to the defendant to move for a new trial. The Jury returned a verdict for the plaintiff. Afterwards,

Van Ness, for the defendant, moved for a new trial, with leave to move in arrest of judgment for the insufficiency of the declaration, should the Court refuse a new trial.

By the Court. It is settled, that on a contract for the sale of property, an action of *assumpsit* will lie, on a warranty made at the time of sale, or an action of deceit for a fraud in the sale. And there are cases, where, from the fraud practised by a seller, the purchaser has a right to rescind and demand back the consideration paid. And in such case it is always at the option of the purchaser, whether he will rescind the contract, or affirm it; and seek redress by an action of deceit or some proper action to recover his damages. But if the purchaser choose to put an end to the contract, and in an action of *indebitatus assumpsit* to recover back the consideration paid, he must, in due time, offer the seller to rescind the contract, and demand a repayment of the purchase money.

In this case it does not appear that the plaintiff has ever offered to rescind the contract, or demanded a repayment of the purchase money. There is therefore no doubt, that, in this case, *indebitatus assumpsit*, either for money had and received, or for goods sold and

delivered, cannot be maintained; and the only question is, whether this is an action on the warranty to recover damages, or an action of *indebitatus assumpsit* to recover back the consideration. The Court give no opinion whether the declaration be good or sufficient on either ground. But they think the declaration is to be considered as in *assumpsit* on the warranty. The plaintiff properly gave evidence of the damages which he had sustained by the unsoundness of the horse which he received in exchange.—In doing this it was unavoidable to take into consideration what he gave in exchange. The motion for a new trial cannot prevail.

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Van Ness then filed a motion in arrest of judgment for the insufficiency of the declaration.

Continued to the next Term.

WEED *vs.* BUTTERFIELD.

Evidence that the plaintiff had made a contract with A. to cut on the land of A. and draw and deliver to him a quantity of spars—that the plaintiff had on such contract cut and trimmed forty spars, which the defendant took and delivered to A. and received the money from A. for cutting and drawing the spars, will not support a declaration counting on a special promise by the defendant to deliver the plaintiff forty spars, nor a count for goods sold and delivered, as the spars taken were not the property of the plaintiff.

THIS was an action of *assumpsit*. The declaration contained a count on a special promise by the defendant, to deliver to the plaintiff seventy-two spars, in consideration of seventy-two spars which the plaintiff had delivered to the defendant; and a count for goods, wares and merchandize sold and delivered.

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Plea—*The General Issue*.

It appeared in evidence, that the plaintiff had made a contract with Heman Allen, to cut on Allen's land, and draw to a certain place for rafting, a quantity of spars.—That on this contract the plaintiff had cut and trimmed ready for drawing about forty spars. And that the defendant, who had made a similar contract with Allen, took the spars which the plaintiff had cut and trimmed, delivered them to Allen on his contract, and received his pay for cutting and drawing them.

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Van Ness, for the defendant, contended that the evidence in the case did not support the first count, as it did not prove the special promise as alleged; nor the second count for goods sold and delivered, for it appeared that the plaintiff was not the owner of the spars;—he could not be entitled therefore to recover the value of the spars, but only the value of the labour which he had bestowed on them.

By the Court. It is clear that the evidence does not support either count in the declaration. There ought to have been another count for work and labour, or a count for money had and received, as the defendant had received money for the cutting of the spars, which belonged to the plaintiff.

The plaintiff suffered a nonsuit.

WALBRIDGE and others *vs.* GRISWOLD.

Assumpsit will not lie against a Sheriff, or other officer, for a misfeasance or nonfeasance in the execution of his official duties.

THIS was an action against the defendant as Constable of the town of Enosburgh, for not making a return of a writ of attachment. The declaration states, in substance, that the plaintiffs heretofore, to wit, on the 28th day of June, 1811, prayed out a writ of attachment in their favour against Stephen House of Enosburgh, dated the day and year last aforesaid, duly signed and directed to the Sheriff or either Constable of Enosburgh to serve and return, and made returnable to the County Court then next to be holden at St. Albans. And afterwards, to wit, on the 14th day of August, 1811, at Enosburgh, delivered said writ to the defendant, who then, and for a long time afterwards was legal Constable of Enosburgh, to serve and return according to law. And the defendant so being Constable as aforesaid, and having received said writ, did on the same day and year last aforesaid, at Enosburgh aforesaid, undertake, and then and there, to the plaintiffs faithfully promise to serve and return said writ according to law and the directions therein given. Yet the defendant, not regarding his said promise and

undertaking so by him made as aforesaid, nor the duties of his office as Constable as aforesaid, but, intending to defraud the plaintiffs in that behalf, did not serve and return said writ of attachment at the return day thereof, or at any day before or since; but intending to defraud the plaintiffs in that behalf, wholly neglected and refused, whereby the plaintiffs have wholly lost their said debt, &c.

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The defendant pleaded in bar.

To the plea there was a demurrer and joinder.

Wetmore and *Smedley*, for the plaintiffs.

Swift, for the defendant.

CHIPMAN, Ch. J. delivered the opion of the Court. The plea of the defendant in this case is so manifestly insufficient, that it is unnecessary to make any observations respecting it. The case must be decided on the sufficiency of the declaration. And the question is, whether this declaration can be supported, either on the statute, or at common law. It does not purport to be a declaration on the statute, neither will the statute support a declaration in *assumpsit*. The remedy given by the statute is where the officer shall *wilfully* refuse or neglect to serve, or shall *wilfully* neglect to return a writ, or shall make a false or undue return. And he is made liable to pay to the party aggrieved all damages which he shall have sustained by reason of such neglect or refusal; to be recovered in an action on the statute. And he is also, on conviction, made liable to a fine not exceeding one hundred dollars.

In an action on the statute the neglect or refusal must be expressly charged to have been *wilful*. The omission of the word *wilful* cannot be supplied by any circumlocution.

But there may be a degree of negligence less than wilful, or which could not be deemed wilful, and for which an action on the case at common law is the proper remedy. Between such case, and the cases embraced by the statute, there will be found a distinction very analogous to the distinction between a voluntary and negligent escape. The action on the case is for a nonfeasance, and an action of *assumpsit* will not lie. The case from 2 Wilson, 235—Russel *v.* Palmer, which has been cited at the bar, has no analogy to the case before the Court. That is a declaration against an Attorney, whose undertaking is voluntary, for a neglect of the duty of his em-

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ployment, in which he had engaged. *Assumpsit* is the proper and established form of action in such case. But it is believed that this is the first attempt to declare in *assumpsit* against an officer in a case like the present. The action does not arise *excontractu*, or *quasi excontractu*, but *exdelicto*. It arises from the neglect of an official duty in the officer—a duty which the law has enjoined upon him, for the due administration of justice. The breach of this duty, when an injury to an individual, is a species of wrong for which an action on the case is the only proper remedy.

It has been said that an action of *assumpsit* in this case is as proper as an action of debt for an escape, which supposes a contract. But the action of debt for an escape does not lie at common law—it was given by statute—1 Ed. 2—or rather, as it has been generally holden, by the equity of the statute of Westminster, 2. The debt lost through the neglect of the officer, is given against him to the party aggrieved, by way of penalty; and it belongs to that class of actions. It lies not however for escape on mesne process, but of one in execution. The action of debt is not given by our statute, and it does not seem consistent with its provisions to permit it.

Upon a full consideration of this case, the Court are clearly of opinion that this declaration in *assumpsit* cannot be supported.—There must therefore be

Judgment for the defendant.

SELECTMEN of St. Albans *vs.* JOHN CURTIS, 2d, and others.

Where the condition of a bond is simply to indemnify and save harmless the obligee from the payment of a debt, or damages, the condition is not broken, until the obligee has been compelled to pay, or, having become liable has actually paid the debt or damages, or has been arrested, or in some way sustained actual damages.

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JOHN Curtis, 2d. was on the 12th day of March, 1810, appointed first Constable and Collector of the town of St. Albans, and for the faithful performance of the duties of that office, and to indemnify the town, he and the two other defendants, John Nason and Jehial Holdridge, executed a bond to the Selectmen, in the penal sum of

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St Albans, *vs.* J. Curtis, 2

one thousand dollars, on which bond this action is brought. The declaration states the occasion of giving the bond, and sets forth the bond and also the condition, which is—That, if the said John Curtis, 2d. shall well and faithfully execute the office of first Constable and Collector, for the town of St. Albans, for the year ensuing, and shall at all times indemnify and save harmless, said town from all damages, costs and charges, that may in any manner accrue to said town, from the neglect, default or laches of the said John Curtis, 2d. in his said office of Constable and Collector, as aforesaid, then &c. The breach of which condition, is assigned as follows to wit: That on the 18th day of December, 1810, the Treasurer of the State, Benjamin Swan, issued a warrant to said John Curtis, Constable and Collector, as aforesaid, to collect of the inhabitants of St. Albans, a tax of one cent on the dollar of the list, granted by the legislature &c—amounting to the sum of two hundred thirteen dollars seventy-five cents, and to pay the same over to said Treasurer, on or before the first day of June, then next. That the Selectmen of St. Albans, made out an assessment or rate bill of said tax, and delivered it to said John Curtis, Constable and Collector, as aforesaid, (no time when) and on receipt thereof, to wit, at St. Albans, aforesaid, on the day and year last aforesaid, the said John Curtis promised and engaged to said Selectmen, to collect said tax and pay it over according to law. Yet the said John Curtis, not regarding the duties of his said office, or his promise and engagement, so made and entered into as aforesaid, has never paid to the treasurer of said State, the amount of said tax, or any part thereof, though often requested and demanded. That on the fifth day of June, 1811, Benjamin Swan the said Treasurer, issued an extent against the said John Curtis, directed to the Sheriff of Franklin County, commanding him (in the usual form) to collect of the said John Curtis, the sum of one hundred ninety three dollars sixty four cents, being the amount in which the said John Curtis, was delinquent, on the aforesaid tax. Which extent was made returnable in sixty days, from the time it should be received by said Sheriff. That the Sheriff received it on the 18th day of July, 1811; and afterwards the Sheriff returned that extent, with a certificate thereon endorsed, in the words and figures following to wit: Franklin County, September 2d, 1811. I cannot find goods, chat-

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tles, or estate of the said John Curtis, 2d, to satisfy this extent, I therefore return the same wholly unsatisfied.

SETH WETMORE, *Sheriff.*

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By reason of all which the said town of St. Albans, has been damnified, and has by reason of said Curtis, laches, default and neglect, suffered damage to the amount of the aforesaid sum of one hundred ninety one dollars sixty four cents, and lawful interest thereon, to the amount of twelve dollars forty five cents, and a large amount of Costs, to wit, twenty dollars whereby an action hath accrued, &c.

To this declaration there was a demurrer and joinder.

The court on the opening of the cause, observed, that the declaration was very loosely and inaccurately drawn.—That in one part of the declaration, one of the defendants, the Collector, is charged in *assumpsit*, which is superfluous and improper. Nor is it perceived, that what is there *avered*, as a breach of the promise alledged, can be taken as an assignment of a breach of the condition of the bond. What follows and probably was intended as an assignment of a breach of the condition, is very vague. It contains no direct averment that the Collector had not collected and paid over the tax.—It is stated, that on the 15th day of June, 1811, the Treasurer issued an extent against the Collector, for the sum of one hundred ninety one dollars sixty four cents, being the amount in which the said Curtis was delinquent. Nor is it avered, that the Collector did not pay and satisfy the extent, or that the Sheriff could not find goods whereof to satisfy it, and therefore returned the same *non est*. Instead of this, it is stated, that the Sheriff, on the 2d day of September, 1811, returned the extent into the office of the Treasurer, with the following certificate thereon endorsed; which is recited in *hace verba;* although this may be considered as evidence of a *non est*, yet the fact, that the extent was returned *non est*, is not alledged.

The counsel, both of the plaintiff and defendants then said, that it was the wish of both parties, to submit to the court only the single question, whether the town of St. Albans, having become liable to an extent, although no such extent had been issued, and no costs or expense had yet been incurred, an action could be maintained on the condition of indemnity. The counsel were thereupon directed to proceed in the argument of the question stated.

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Wetmore, for the defendants.—To maintain this action, for a breach of the condition of indemnity, it is incumbent on the town to shew that they have been damnified, and how they have been damnified. Admit that the Collector has not paid over the whole amount of the tax, committed to him for collection; that an extent had been issued against him, which had been regularly returned *non est*, whereby the town had become liable to pay, liable to an extent against them for the tax which had not been paid over. Yet the town have not thereby been damnified, they have not been compelled to pay—they have not paid any sum whatever, and have been put to no expense by reason of any latches or default of the Collector. It is indeed, avered generally that the town had been put to costs and expense; but it is not shewn how this has or could have happened. This is not sufficient; it is left merely on the liability; but merely to have permited a liability to be incurred, is not a breach of this condition of indemnity.

Aldis and *Swift* for the plaintiff.—Contended that it was a sufficient breach of the condition, that a liability had been incurred through the default or latches of the Collector. That it was not necessary, to the maintenance of this action, that the party to be indemnified, should have paid, or been compelled to pay any thing. In support of which, they cited 5 Coke, 25, Broughton's case. 5 T. Rep. 317.—Cox and others, *vs.* A. Joseph, executrix.—Cro. El. 123, Barkeley and Gibbs *vs.* Kempston.

CHIPMAN, Ch. J. The exception relied upon is, that it does not appear by the declaration, that the town of St. Albans has been damnified, has been put to any trouble or expense; but merely that the town, has on the *non est* return by the Sheriff, of the extent against the Collector, become liable to an extent for the sum in which the Collector has been delinquent. Authorities have been produced, from which it appears that there are some ancient cases and dicta, which seem to support the opinion, that in this kind of action, it is sufficient that the person to be indemnified has become liable to suffer without having actually sustained any damage. But it is settled by modern authorities, that the person to be indemnified, to entitle him to maintain an action, must shew that he has sustained damages in the payment of the money, or in something to which the contract of indemnity extends. It is not indeed necessary, that he should wait to be sued before he pays the money,

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against the payment of which he is to be indemnified. When the liability has attached he may in general pay, and maintain his action on the contract of indemnity. But merely to have become liable is not sufficient; this appears to be the settled law, and is consistent with sound reason. There is, however, a clear distinction to be made, and which has not been attended to in all the cases, or perhaps in the abridgement of the cases. Where the condition is simply to save harmless from the payment of a debt, the condition is not broken until the obligee has been compelled to pay, or having become liable has actually paid or been put to expense. But if the condition be, that the obligor shall pay the debt when it shall become due, and discharge the obligee from the debt, and also save him harmless; in such case, if the obligor shall not pay the debt, or procure the obligee to be discharged therefrom, when it shall fall due, the obligation is forfeit; for it is sufficient if one condition be broken. The surety has a right; and it is often a matter of prudence to hasten a discharge of the debt, by such a special condition.

Broughton's Case, 5 Coke, 24, which has been cited by the plaintiff's council, was that of a surety, who, when the debt became due, paid it for the principal, without waiting for a suit against him. It was said, indeed, in that case that the plea *non damnificatus*, implied that the defendant had saved the plaintiff harmless, by a release, payment or otherwise. But this was a mere dictum, and quite out of the case, as the plaintiff had actually paid the debt.

In Freeman *v.* Sheen, Croke James, 340, Coke and all the court held, that where one is obliged to acquit another, it is not sufficient to save him harmless, but he ought to procure his actual discharge. This clearly admits the distinction. Barkely and Gibbs, *v.* Kempston, Croke, El. 123, was on a promise to keep a prisoner safely, and to save the plaintiff's bailiffs, of Worcester, harmless of all escapes. The action was held to lie, for the breach in not keeping the prisoners safely, who had been suffered to escape, and that, although the Bailiffs had not been sued. Here again the same distinction, although not noticed by the reporter. Griffith *v.* Harrison, 1 Salk. 196, was an action on a covenant, for quiet enjoyment, and that the plaintiff should be free and clear, and clearly discharged *or* saved harmless of all arrears of rents, &c. The court held the assignment of the breach bad, because the plaintiff had not shewn a disturbance in the enjoyement; for that the

rent being in arrear, was not a breach of the covenant. In this case the same distinction is made. *Franklin*, December, 1813.

Perhaps in the case before the Court, but on this the Court give no opinion, a sufficient breach might have been assigned on the condition that John Curtis 2d, should well and faithfully execute the office of Constable and Collector. But such breach is not assigned, unless it be taken by implication, which cannot be done. There must therefore be

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Judgment for the defendants.

STATE *vs.* JEWETT.

The Supreme Court have not original Jurisdiction of an offence against the seventh Section of the act, directing the mode of election of the Governor, lieutenant Governor, Treasurer of the State, Councillors and Representatives. The penalty being given to the town Treasury.

THIS was an indictment found in this Court, charging the respondent, with having put in more than one vote for one person in the same election to one office, (representative) against the seventh section of the act, directing the mode of election of the Governor, lieutenant Governor, Treasurer of the State, Councillors and Representatives. The respondent pleaded not guilty, and, on trial to the jury, a doubt arose whether the Supreme Court have original jurisdiction of the offence charged in the indictment, as the penalty is given to the town Treasury.

A juror was withdrawn by consent, with leave to the respondent to take any exception to the jurisdiction of the Court.

Afterwards *Marvin*, States Attorney, informed the Court, that on examination, he was satisfied that the Supreme Court have not original jurisdiction of the offence charged in the indictment, and entered a *nolle prosequi*.

Chittenden, January. 1814.

ROBERT PEASLEE, Administrator of ZACHEUS PEASLEE,
vs.
STANIFORD, Sheriff.

In an action against a Sheriff for not paying over monies by him collected on an execution, if he plead the general issue with notice that, on the trial, he will give in evidence, that a third person had recovered judgment against him for the value of the property sold on the execution, without stating a prior right in such third person; such notice is insufficient.

Such judgment is not conclusive against the plaintiff unless it appear that the plaintiff had notice of the suit against the Sheriff, and had an opportunity to defend.

And quaere, whether the Sheriff can, in any such case, defend, on the ground that a third person had recovered against him the value of the property of which he had levied the money—certainly not, unless the plaintiff had turned out such property to the Sheriff on the execution.

THIS was an action against Staniford, Sheriff, for not paying over the money which he had collected on an execution in favor of Zacheus Peaslee, the intestate, against Stephen Moore. The declaration stated, in substance, that the intestate recovered judgment against Stephen Moore, for the sum of fifty seven dollars. That he prayed out a writ of execution on said judgment, dated the 2d day of November, 1804, returnable within sixty days, and on the third day of the same November, he delivered the execution to the defendant, Sheriff, to collect and return.

That the defendant had levied and collected the money on the execution, and refused to pay it over on demand.

Plea—the general issue, with notice under the statute, that the defendant would give in evidence, in his defence, that he levied the execution on thirty thousand brick, turned out to him by the intestate in his life time, on said execution, as the property of said Moore. That he sold the brick at auction on several days, naming them, within the life of the execution, for a sum sufficient to satisfy the same. That afterwards Moses Catlin of Burlington, commenced an action of trespass against him, the defendant, for taking the same brick, (setting forth the action) and in that action recovered the value of the brick. For which reason, he the defendant retained the money which he had collected on the execution, and did not pay it over.

The plaintiff gave in evidence, the defendant's receipt for the execution, together with the execution from the office to which the de-

fendant had returned it, with the defendants return thereon indorsed, that he had levied the same on the brick, had sold them for the sum of sixty-seven dollars, and paid the overplus to Moore, the debtor. It was conceded, that Zacheus Peaslee, the intestate, demanded the money of the defendant in the month of January, 1805.

E. Keys, for the defendant, offered evidence of the facts contained in the notice.

Van Ness, for the plaintiff, objected.

1. It is an attempt, by the Sheriff, to contradict his own return. 2. If any doubt arose whether Moore was the owner of the brick, the Sheriff should have taken from Peaslee a bond of indemnity, agreeably to the statute, and on that, taken his remedy. 3. The notice is defective and wholly insufficient; if all which is contained in the notice be proved, yet it will be no legal defence to the action. It is not stated in the notice that the brick on which the defendant levied the execution were not the property of Moore, or that they were the property of Catlin. Nor, is it stated that Peaslee had any notice of the suit in favor of Catlin against the defendant, Staniford. The notice gives a history of the suit and the recovery, but it is not even averred, that the recovery was had by reason of a prior right in Catlin.

Keyes and *Harrington*, for the defendant, contended, that although an officer may require of the creditor a bond of indemnity previous to the levy of an execution on personal property, yet, if he do not, he has other means of redress. If a creditor turn out property to an officer, and direct the officer to serve an execution on the property, it implies an engagement by the creditor, that it is the property of the debtor; it implies a warranty of that fact. And if it turn out that the property, thus taken by the officer, was not the property of the debtor, and the officer, by reason thereof, be compelled to pay its value, he may have his remedy by action against the creditor, or, he may retain the money for which the property was sold. The notice is proper, and the matters therein, sufficient. The legislature intended to give more latitude, in giving notice, than is given in special pleas; and cited section 97, of the Judiciary act, and section 9, of the act directing the levying of executions, giving a remedy, where an execution is levied on property which is not the property of the debtor.

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Peaslee, *vs.* Staniford.

By the Court.—This notice is wholly insufficient; such notice ought to make out a good defence; the same, in substance, as a plea in bar. It is not necessary to enter at large into the nature of the defence in this action. But, it is clearly necessary, that the notice should contain an averment of a prior right to the property in Catlin, and that the recovery was had on such right. And even then, unless Peaslee, the intestate had had notice of the suit in favor of Catlin against Staniford, and an opportunity to defend, he could not be concluded by a recovery in favor of Catlin against the Sheriff.

Keyes and *Harrington* for the defendant.—Then stated that the brick were by Peaslee the intestate, turned out to the Sheriff, as the property of Stephen Moore, the debtor in the execution, and that they were sold on the execution, by the express directions of Peaslee. That immediately after the sale, they were claimed by Catlin, and that Catlin was in fact the owner of the brick. That Catlin commenced an action against Staniford, as before stated, and recovered the value of the brick.—That Staniford gave notice to Peaslee, the creditor in the execution, of the commencement of the suit, but he paid no attention to the defence of the action; and offered evidence of these facts under the general issue.

The Court doubted, but finally permitted the defendant to go into the evidence.

A record of the Judgment in favor of Catlin against Staniford, was then produced by the defendant.

Van Ness, objected to the reading of the record in evidence.

Zacheus Peaslee, the intestate, was neither party nor privy to the record; it cannot, therefore, be evidence against him or his representative.

By the Court.—As the defendant has been permitted to go into this defence, it is a matter of course to admit the record, the same as though this were an action for indemnity.

The record was then read to the jury.

Moses Catlin, called as a witness by the defendant, testified, that the brick were his property at the time the execution was levied upon them.—That the Sheriff took a few of them on the execution,

that the question respecting his right to the brick might be tried. That the action was commenced by agreement between him and Staniford, Peaslee was not consulted.—That he, the witness took the remainder of the brick.—That he had a bill of sale of the brick from Moore, before the brick were made, to secure him for advances which he was to make to Moore, and did make in carrying on the business.

Van Ness, for the plaintiff, objected to any evidence relative to the bill of sale, or the purchase of the brick by Catlin, until the bill of sale should be produced.

By the Court.—As there appears to be a bill of sale in writing, no parol evidence can be admitted to show a transfer of the brick from Moore to Catlin. It is the common case, where there is written evidence, it must be produced, unless the non production of it be legally excused. It is the more necessary in this case, as there is some appearance of collusion. The bill of sale not being produced, the jury were directed to find for the plaintiff the amount of his debt collected on the execution, with interest on the same, at the rate of 15 per cent per annum, agreeably to the statute. The jury accordingly returned a

Verdict for the plaintiff.

NOTE BY THE CHIEF JUSTICE.

QUERE—As to the propriety of admitting the defence which was attempted in this action, as an excuse or justification for not paying over the money collected. It may, where the property has been turned out by the creditor, to the Sheriff, save a circuity of action. But it serves to render the trial very complicated; and may open a door to much collusion.

PEARL *vs.* HOWARD.

The statute regulating Conveyances, provides, as a general rule, that every deed of conveyance, shall be acknowledged before a magistrate, and if the proof of a deed be taken before a judge, the certificate of such proof must state the existence of those facts, which takes the case out of the general rule, and brings it within the exception made by the statute, authorising such proof to be taken before a judge.

THIS was an action of ejectment, for a lot of land in Milton.

Plea—the general issue.

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Pearl vs. Howard.

On trial the plaintiff offered in evidence, a deed purporting to have been executed by one Barkley, of Poughkeepsie, in Dutchess County, in the State of New-York. The deed was not acknowledged by the grantor, but had been proved before a judge of the Supreme Court in this State, by one of the subscribing witnesses. The certificate of the judge, stated the proof to have been made, but stated no reason, why the personal acknowledgement of the grantor had been dispensed with, or the ground on which the judge admitted the proof.

Allen, for the defendant objected to the reading of the deed as evidence, on the ground that the statute regulating conveyances had provided as a general rule that every deed be authenticated by a personal acknowledgement of the grantor, before a magistrate.—That the statute provided for taking the proof of deeds in certain special cases only, as exceptions to the general rule.—That proof of a deed therefore, could not be taken in any and every case as a matter of course; but in those cases only, which are by the statute, excepted from the general rule; and that it must appear from the certificate of the proof, that the case came within the exception of the statute, and cited 6th section of the act, for authenticating conveyances, 1 vol. compiled Laws, 190; and section 13, 195.

G. Robinson for the plaintiff, replied.—That the certificate in this case, was made in the usual form.—That he had never known a judge taking the proof of a deed, certify the reason for taking the proof.

By the Court.—The statute permits proof of the execution of a deed to be taken instead of a personal acknowledgement of the grantor before a magistrate, in particular cases only, which were made exceptions to the general provisions of the statute. And it ought to appear from the certificate of the judge or the court, before whom the proof was taken, that the case was within some one of the exceptions of the statute, or it cannot appear that the proof was properly admitted.

The 5th section of the Statute, regulating conveyances, contains a general provision, for the authentication of deeds of conveyance, as necessary to give them the full effect intended by the act. And that is, that the party executing shall in person acknowledge the execution before a justice of the peace; this forms the general rule,

and every person in the State, holding and exercising the office of justice of the peace, has authority to take and certify such acknowledgement. To this general rule there are several exceptions. As in the 6th section, when any grantor or lessor, shall go beyond sea, shall remove, or be absent from this State, or dead, before the deed of conveyance by him or her signed, shall be acknowledged, in such case, proof of the execution of such deed by any one of the subscribing witnesses made before any Councillor, Judge of the Supreme Court, or judge of any County Court, in this State, shall be equivalent to the grantor's acknowledgement before a justice of the peace.

Another and further exception in the same section is, that when the grantor and all the witnesses shall die, remove out of the State, or have gone beyond sea before such deed shall have been acknowledged, proof of the execution thereof may be made before the Supreme Court, or before any County Court in this State, by proving the hand writing of the grantor, or witnesses; or by other proof to the satisfaction of the court; and which, being certified, agreeably to the directions therein given, shall also be equivalent to an acknowledgement by the party executing. These are clearly excepted cases. And, in order that proof be admitted, in lieu of a personal acknowledgement in any instance, it must appear in the certificate, or document of proof, to be a case within some of the exceptions. This cannot be supplied *aliunde*. Such, if we consider the intention of the Legislature, as expressed in the preamble to the act, will appear to be the unavoidable construction.

The words of the preamble are.—"Whereas it is necessary to prevent uncertainty, fraud and perjury, in transferring real estate, that a mode therefor should be established, easy, certain and notorious—Therefore," &c.

If the proof of a deed do not appear by the certificate to be a case within some of the exceptions mentioned, we may make a presumption in favor of its authenticity: we may take it as *prima facie* evidence, that the Court or judge acted right, and upon a proper occasion, and permit the party in interest to set it aside by proof. But this would frustrate the intention of the act.—It would leave the authenticity of the instrument uncertain, which it was clearly intended should appear conclusive on record in the proper office. Nei-

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ther the bonafide purchaser, or the bonafide creditor, could rely on the information obtained from the record. They might both be deceived to their utter ruin, by proof *ab extra* of which they had no means of knowledge.

If we take it, as conclusive of the case, because the judge or the Court have acted therein, it will nearly supercede the general provision, that instruments shall be authenticated by a personal acknowledgement of the grantor before a magistrate; beside opening a wide door to those frauds, which it was intended to prevent.—Still further, it would cantravene an established rule of construction, which is, that in any case of special or particular jurisdiction or authority, given in particular instances, no presumption is to be made in favor of the jurisdiction or authority. All proceedings under pretext of such authority, are deemed null and void, unless it appear on the face of the proceedings to be a case clearly within it. This is a clear and settled distinction, as it respects a general jurisdiction or authority, and that which is special or limited to particular occasion or cases, presumption is in favor of the former, not of the latter. The deed therefore, cannot be read in evidence.

Verdict for the defendant.

Bown & Eddy *vs.* Bean.

In an action of ejectment, if the plaintiff shew that the defendant claims under the same proprietary division, on which the plaintiff relies, it is not necessary for the plaintiff to shew a legal division; yet, if the action be brought for a certain lot, in a certain division, and there be no other description of the land in the declaration, it is necessary for the plaintiff to shew a division in fact.

A deposition taken in a foreign government, cannot be read in evidence, unless it be shewn to the Court, that the magistrate before whom the deposition was taken, was authorised by the laws of such government to take depositions.

THIS was an action of ejectment for lot number 37, in the third division of lands in Milton, laid to the original right of J. T. one of the grantees in the charter of Milton.

A Marsh for the plaintiffs, having shewn a good title in the plaintiffs to the said right of J. T. in the town of Milton, offered in evidence, an office copy of a deed from a third preson to the defendant

of the same lot, as laid to the same right; and contended that this rendered it unnecessary for the plaintiff to produce any evidence of a division.

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By the Court.—It has long been settled, that where the plaintiff and defendant claim the same land under the same proprietary division, the defendant is precluded from disputing the legality of the proprietary proceedings in making the division. This is in perfect analogy to the principle, so well settled, that where the plaintiff and defendant both claim title from the same source, neither can call in question the validity of the title in the person, from whom both parties claim to hold their title. Still in this case, until the plaintiff shew a division in fact, it cannot appear that there is any such lot in *Milton*, as lot no. 37, in the third division laid to the right of J. T. It is therefore nessary, in this case that a division in fact be *shewn*.

Van Ness for the defendant, then conceded, that the lot in question was laid to the right of J. T. and set up a claim under the statute of limitations.

To prove that the defendant had been in possession of the lot in question more than fifteen years before the commencement of the plaintiff's action, he offered to read the deposition of one D. purporting to have been taken in the British province of New Brunswick, before John Brown Justice of the peace.

A. Marsh for the plaintiff, objected to the admission of the deposition. It appears to have been taken, in a foreign government, by a person subscribing as a justice of the peace, but it does not appear, by any evidence offered, that he was in fact a justice of the peace; nor does it appear that the laws of that province, authorizes justices of the peace to take depositions.

By the Court.—Both exceptions are fatal. The Court cannot know without proof, who are justices of the peace in a foreign government; it is a matter of fact to be proved to the Court. It is the same as to the laws of a foreign country. But there is something further in this case. From our necessary acquaintance with the laws of Great Britain, of which New Brunswick is a province, we are well assured that no authority is there given to justices of the peace to take depositions. The deposition cannot be admitted.

 Verdict for the plaintiff.

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KING *vs.* BEVINS, and others.

If B. hire a Sloop, and take passengers on board, such passengers are not liable to the owner of the Sloop, for the loss of the Sloop, or for any injury done to it from any want of skill or negligence of B.

THIS was an action of trespass with force and arms, for taking away out of the possession of the plaintiff, the Sloop Lark, and destroying her. The death of Bevins, since the commencement of the action, was suggested on the record, and the other defendants pleaded the general issue.

On trial, it appeared in evidence, that Bevins hired the Sloop, then lying at Burlington Bay, of the plaintiff, for one day, to go to the mouth of Onion River, for the purpose of fishing.—That after he sailed, finding the wind contrary, he turned his course and went to Shelburn, and took in a load of stone on his own account, and returned to Burlington on the same day at evening, and left the Sloop at the wharf with the loading on board, in a situation not very safe.—That in the night the wind rose, drove her against the wharf, she bilged and sunk. It also appeared in evidence, that Bevins hired the sloop on his own account.—That the other defendants were taken on board by Bevins, some as passessengers, and some as hands to assist in navigating the sloop, and acted solely under the directions of Bevins.

By the Court.—Whether from the evidence in this case, the action of trespass could have been maintained against Bevins, it is unnecessary to decide; for, it is clear that it cannot be maintained against the present defendants, who were, either hands on board employed by Bevins, or passengers taken on board by him for their fare. He Bevins, had a right, having hired the sloop of the plaintiff, to take them on board, and they were not accountable for Bevin's want of skill or negligence. As well might the passengers in a stage coach be made accountable for the negligence or want of skill in the driver, by which the carriage was destroyed. In the case Davy against Chamberlain and others, 3 Esp. N. C. 229, it is said by Lord Ellenborough, that if a person driving his own Carriage take in another person as a passenger, such person cannot be subject to an action for any misconduct of the proprietor in driving the carriage, (for driving against any person on the road,) but if

both are jointly concerned in the carriage, as if both had hired it together, they must both be liable for any misconduct of either. It is obvious that it would be the same, in case of damage done to the Carriage. Accordingly the jury returned a

Verdict for the defendants.

CHIPMAN *vs.* TUTTLE.

IN this case a deposition was offered by the defendant to which the plaintiff took an exception—that the justice taking the deposition had certified as a reason why the opposite party was not notified of the taking of the deposition, that he resided more than twenty miles from the place of caption. Whereas the statute requires that the opposite party shall be notified if living within thirty miles from the place of caption.

By the Court.—Judges FARRAND and HUBBARD, (the Chief Justice being related to the plaintiff, did not set in the trial of this case.) The statute requires, that the opposite party be notified, if living within thirty miles of the place of caption. For aught appears in this case the opposite party lived within thirty miles of the place of captien, and yet he was not notified of the taking of the deposition.

The defendants Council then offered evidence to prove that the opposite party did in fact live more than thirty miles from the place of caption, which they said was evidence of a more certain and satisfactory nature, than a certificate of the justice taking the deposition.

But by the Court.—The statute expressly requires, that this be certified by the justice, as a reason why the opposite party was not notified. Other proof cannot be received instead of the certificate of the justice. The deposition cannot be read in evidence.

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BRUNDRIDGE *vs.* WHITECOMB and others.

In an action by the assignee of a gaol bond against A. as principal, and B. as surety, the defendants may plead a separate demand in favor of A. the principal, in off-set to the plaintiffs demand.

CHIPMAN, Ch. J. delivered the opinion of the Court.

This is an action on a bond executed by Robert Whitecomb, as principal, and James Whitecomb as surety, to the Sheriff of Chittenden County, on the admission of Robert Whitecomb, one of the defendants to the liberties of the prison, who had been committed to prison on an execution in favor of Joshua Brundridge, the present plaintiff. Robert Whitecomb committed an escape and the Sheriff assigned the bond to the plaintiff. The defendants confessing the plaintiff's cause of action, have pleaded, as a set-off to the plaintiff's demand, two judgments regularly obtained against the plaintiff in favor of Robert Whitecomb, one of the defendants, and principal in the bond. Both judgments were recovered before the commencement of the present action.

To this plea there is a demurrer and joinder.

In support of the demurrer, the plaintiff's council have taken two exceptions to the plea. 1. The plaintiff's demand is not in debt for the penalty of the bond, but sounds wholly in damages for a breach of the condition of the bond, the escape of Robert Whitecomb. There is nothing in this exception. It is true the recovery is on the breach of the condition. But, by the statute, the plaintiff, in this action is to recover satisfaction of his original judgment, with costs, including those of the execution and commitment, with interest; and it is, as on a note of hand, a mere matter of computation.

The second exception is, that the plaintiff's demand and the demand pleaded in off-set, are not mutual demands, they are not demands between the same parties. The demand claimed to be set-off being in favor of Robert Whitecomb only, one of the defendants.

It is generally true, that a set-off can be allowed between the same parties only, and in the same right. If there be two or more plaintiffs, or two or more defendants, in the same suit, the demand to be set-off, must be in favor of all the defendants, and against all the plaintiffs. In a suit in favor of an administrator, no demand in his

own right, can be set off in that suit against the plaintiff's demand. But the law will, in this, as in other cases, take notice of the persons beneficially interested, and whose is the duty. Thus where the plaintiff was in fact but a trustee for another person, the defendant was allowed to set-off a debt due to him from such third person. Winch *v.* Keeley, 1 T. R. 119, and the cases there cited.

In the case Woodbridge against Austin, in this Court, in Addison County.—Woodbridge was the indorsee of a note merely, in trust for the curator, (administrator) of Thomas Aylwin, the court allowed a demand in favor of Austin against the estate of Thomas Aylwin to be set off, and the plaintiff became non suit.

Afterwards an action was brought against Austin in the Circuit Court of the United States, on the same note in the names of Auldjo and Maitland, to whom the note had been endorsed by the curator of the estate of Aylwin, in trust. The same demand in favor of Austin against said estate was pleaded in off-set, and allowed by that Court.

In the case Stacy & Ross *v.* Dewey, 2 Esp. C. 469, the plaintiff's were partners in the grocery business, the shop was kept in the name of Ross only. The defendant had done business for Ross on his own account, not on account of the partnership, to a greater amount than the demand, now made against him by the partnership, which he offered to set-off. It was allowed, because Ross had appeared to the world, as doing business only on his own account.

The reason is the same in relation to defendants. Puller and others *v.* Rose and others, Peak, N. P. C. 197, is a strong case. A. B. and C. were in partnership together.—C. and D. also traded on their own separate account. The partnership of A. B. and C. became indebted to C. and D. in satisfaction of which they indorsed a note given to their firm. In an action brought on the note by C. and D. it was decided that the defendant might set-off any demand which he had against the firm of A. B. and C. The present case is equally strong, whether we consider it in point of law, equity or convenience. It is a case of principal and Surety. The demand to be set-off is in favor of the principal, the original debtor, who is bound in equity and conscience to pay the debt, and save the surety harmless. The demand of the plaintiff, as set forth in the declaration, and the demands pleaded in off-set all originated between the plaintiff and Robert Whitecomb, the principal in the bond, and in

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Brundridge vs. Whitcomb et al.

the decision of this case it may be considered, that the plaintiff's demand is against Robert Whitecomb, —— James Whitecomb being a mere surety for the payment of that demand. The law and the justice of this case strongly coincide. The off-set must be allowed and judgment rendered for the Balance.

MEACH *vs.* STONE and PERRY, Administrators of PERRY.

To a bill in Chancery, brought for a specific performance of a contract for the sale of lands, the defendant may avail himself of the statute of frauds, either by plea or demurrer, unless in certain excepted cases, appearing on the face of the bill.

Such case is not taken out of the statute by part performance, unless such performance be made under such circumstances, as to amount to a fraud, against which, a Court Equity will relieve, nor even then, unless such part performance be expresly stated in the bill.

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THIS was a suit in Chancery. The bill stated in substance, that on the first day of April 1810, the Selectmen and Trustees of schools of the town of Charlotte, by indenture of that date, demised to Nehemiah Lowrey and his assigns, a lot of land in the town of Charlotte, containing ninety acres, for the term of nine hundred and ninety nine years, under a rent of $16,05 cents to be paid annually, (setting out the indenture at length) By virtue of which demise, the said Nehemiah Lowrey, entered and was possessed of said lot. That afterwards, and before the first day of October, 1807, (the time not being specified,) the said Nehemiah Lowrey, assigned to Israel B. Perry, of Charlotte, the said indenture of lease for the remainder of the term. By virtue of which said lease, Israel B. Perry entered, and was possessed of said premises, for the residue of said term. That being so possessed, the said Israel B. Perry, on the first day of October, 1807, applied to the plaintiff for the loan of a large sum of money; and proposed to secure the payment thereof to the plaintiff, by an assignment of said lease; (so it is expressed in the bill,) that, on this inducement, the plaintiff did loan to the said Perry, the sum of $670,50 cents, for which he took the said Perry's promissory note of that date, to be paid at the end of three years, with interest. And at the same time the said Perry promised the plaintiff, to secure the payment of the sum

of money, contained in said note with interest, to assign to the plaintiff all his right and interest in said lease, by virtue of his assignment from Nehemiah Lowrey, on the plaintiff's promising, to deliver up said lease and assignment to the said Perry, on the payment of the said note of hand. And on failure of payment at the day, to wit, the first day of October, 1810, the said Perry, to deliver to the plaintiff the quiet and peaceable possession of the premises, contained in said lease. That on the first day of October, 1810, the said Perry, having never paid the money contained in said note, or any part thereof, but having wholly neglected and refused, although often requested; the plaintiff, then and there, to wit, at Charlotte aforesaid, demanded of said Perry to complete said assignment, and to deliver posseession of the premises to the plaintiff; or to pay the said sum of money contained in said promissory note. That in the month of February, 1811, the said Perry died intestate; and the defendants were duly appointed administrators on his estate; that they had represented said estate insolvent. That since the death of the said Perry, and since the defendants were appointed administrators, as aforesaid, the plaintiff had, at divers times, demanded of them to complete said assignment, and deliver possession of the premises to the plaintiff; or to pay the principal and interest due on said note. And that they had neglected and refused. And pray that the defendants as administrators of said Perry, may be decreed to pay to the plaintiff the principal and interest due, and to grow due, on the said note, by a certain day to be limited by the Court, or, in default thereof, to complete said assignment, and deliver possession of the premises to the plaintiff; and, that all the heirs and creditors of said estate be foreclosed.

The defendant pleaded in bar, the statute regulating conveyances, and for the prevention of frauds therein; that there was no agreement in writing, &c. And answered that the estate of said Perry was insolvent, and that they are ready to pay to the plaintiff his dividend on said note, whenever the same shall be declared. But the defendants made no answer relative to said agreement.

Harrington, and *Van Ness* for the plaintiff, took exceptions to the plea, and contended that the plea ought not to be allowed. That the same practice and principles will preval here in questions arising under the clause of the statute which the defendants have pleaded, which have been adopted under a similar clause of the

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British statute of frauds and perjuries. The rule there is, that, if a defendant in his answer, confess the agreement, though not in writing, the Court hold the agreement, as taken out of the statute, by the confession of the defendant, and decree a performance. If a defendant, in his answer, deny the agreement, the plaintiff cannot prove it by parol. But the plantiff has a right to an answer from the defendant, in relation to the agreement; he must either confess or deny it. It is a necessary consequence of an established rule, that whatever in conscience affords a title to the plaintiff, the defendant cannot be exempted from disclosing. It is a right of which the plaintiff cannot be deprived by plea. But, on another ground, the plea ought not to be allowed: this is a case of part performance, and cases of part performance, have never been considered as within the statute.

Robinson for the defendant.—The statute may be pleaded in bar both of the discovery and the relief; if so, it is unnecessary to answer to the agreement. There are exceptions, indeed to this rule, in cases where part performance is clearly alledged, or fraud charged in the bill; but in this bill there is nothing charged which amounts to fraud or to a part performance. Many cases were cited by the counsel, which as far as they were thought to have any bearing on the points decided, are examined in the opinion of the Court, delivered by

Chipman, Ch. J. The bill in this case is very diffuse, and is very inartificially drawn. The practice, which has too much prevailed, has been pursued in this case—the practice of setting out long instruments in writing, *in hace verda*, instead of pleading the legal effect of such instruments, which is the only correct mode of pleading. Thus a few lines may supply the place of whole pages, and be much more clear and intelligible; it is something worse than a useless incumbrance on the record.

The object of the bill is to obtain a specific performance of an agreement, stated to have been made between the plaintiff and Perry the intestate, for the assignment of a lease of a farm in Charlotte, for a long term of years, by Perry to the plaintiff—or rather to obtain a decree, for an assignment of the lease, a delivery of the possession of the premises, and a foreclosure; as it is stated, that the assignment was to have been made by way of Mortgage, to secure

the payment of a sum of money, by Perry to the plaintiff, by a certain day which has long since past.

The defendants have pleaded the statute regulating conveyances of real estate, and for the prevention of frauds therein, in bar; averring that there was no agreement in writing, signed by the parties or either of them. And have answered to the insolvency of the estate of Perry only, setting forth briefly the proceedings in the settlement of said estate, and offering to pay the plaintiff his dividend when it shall be made out by the judge of probate. Exceptions are taken to this plea which rest on two grounds. First, it is contended to be an established principle, that such parol agreement, if confessed, by the defendant, is not within the equity of the statute, and the Court will give relief on such agreement, so confessed; if the agreement be denied, the case is within the statute—and the Court will not grant relief. That the defendant is compelled to answer and either deny or confess the agreement.

Secondly, it is contended that this, as appears on the face of the bill, is a case of part performance, or a case of a performance on the part of the plaintiff, which has always been considered, as a case excepted out of the statute.

It is true, as stated by the plaintiff's council, that our statute pleaded by the defendant in this case, is the same as the British statute, on the same subject; and the cases, arising under it, will embrace the same principles of decision. It is, therefore, proper and necessary to examine the English authorities on the points to be decided.

Very soon after the passing of the British statute, specific relief, on a parol agreement for the sale of lands, was decreed on the confession of the defendant in his answer; and it was said, that, as the statute was made for the prevention of frauds and perjuries, it did not extend to a case where the defendant confessed the agreement in his answer. That there was in such case no danger of perjury, so not within the statute. This was adopted as a rule in Chancery. And, as observed by Lord Thurlow, in the case Whitechurch *v.* Bevis, Bro. C. C. 558, "the rule seems to carry a necessary conclusion, that whatever, in conscience affords a title to the plaintiff, it is impossible to exempt the defendant from disclosing." Now to carry the rule to this extent, is to annihilate the principle on which the statute was founded. For, while, by excluding parol proof of

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the agreement, the danger of perjury, as far as relates to witnesses, is removed, the temptation is accumulated on the party. The defendant is to be compelled to answer under the strongest bias of direct interest; since, by denying, or essentially varying the agreement, he may acquit himself of the demand; for no parol proof can be admitted to contradict him. It was impossible to support the rule to that extent. The principle has since undergone repeated discussion, and has been limited, and finally settled by a course of decisions in the highest tribunals in that country.

It has been decided, that the defendant, pleading the statute, is not compellable to answer respecting the agreement, unless it be a case of part performance, appearing on the face of the bill. The principal cases are. Whaley *v.* Bagnal, 6 Bro. P. C. 45. Whitechurch *v.* Bevis, 2 Bro. C. C. 558. Jordan and others *v.* Sawkins, 3 Bro. C. C. 388. And Redding *v.* Wilkes, 3 Bro. C. C. 400.

The case of Whitechurch *v.* Bevis was decided upon great consideration, and a full investigation of precedents and principles. It was a bill for the specifick performance of a parol agreement for the purchase of a house. A part performance was alledged, in this, that the attorney employed, had received instructions both from the plaintiff and the defendant, to prepare the conveyances, and had made a minute of the terms on which the sale was to proceed. The minute was, "Mr. Bevis agrees to convey the house (describing it) in consideration of forty pounds per annum. Mr. Whitechurch to take the stock at a fair appraisement." That the parties agreed to deliver the title deeds to Chub, the Attorney, to prepare the conveyances, and then deliver them to one Maynard, as a trustee for the purpose of securing the annuity, (the rent of forty pounds). The bill stated further, as a part performance, that the parties had fixed on a person to value the stock; and that the plaintiff had, with the privity and consent of the defendant, entered into articles with a third person, one Webb, to grant him a lease of the premises, as soon as he should be in possession.

To this bill the defendant pleaded the statute of frauds, both to the discovery and to the relief, but did not aver in his plea, that there was no parol agreement; and his answer only went to the part performance, and did not deny the parol agreement.

Exceptions were taken to the plea, and there were three solemn arguments before it was finally decided. The first exception to the

plea was, that it was a case of part performance, so stated in the bill, and, therefore, according to the uniform course of decision, excepted out of the statute. But, the Chancellor decided that none of the facts stated in the bill amounted to a part performance, there was, therefore, nothing in this exception.

The second exception was, that if the defendant had confessed the agreement, it would take the case out of the statute; and the plaintiff would be entitled to a decree; he must therefore answer to the agreement, and either confess, or deny it.

After two arguments, the Chancellor was not fully satisfied, he, therefore, overruled the plea, and ordered it to stand for an answer, with liberty to except; and reserved the benefit of the plea to the hearing. It appears that the defendant had, by a further answer confessed the agreement. The plea was again argued on the exception.

The Chancellor, Lord Thurlow, observing on the rule respecting the defendant's being compelled to answer, to wit, whatever, in conscience affords a title to the plaintiff, it is impossible to exempt the defendant from answering, goes on to say. "The cases have been uniform in this point only: Where the defendant has pleaded the statute of frauds, and has not confessed a *written* agreement, the Court has in no instance, decreed an execution, of the agreement. The case of Whaley *v.* Bagnal, was so determined upon great argument, in the year 1768, and has fixed the rule upon a basis of authority, a great deal too strong, to be overturned, or answered. I have therefore, with great deliberation, turned over the cases, cited; and all I can find are two cases in which relief has actually been obtained, contrary to the statute of frauds. The first case was decided before Lord Mansfield in the year 1723, Child *v.* Godolphin, where it was held the plea should stand for an answer. The other, Cottingham *v.* Fletcher, where the defendant, in his answer, admitted a trust, and it was decreed, that the trust should be executed, notwithstanding the statute. The *dicta* are as frequent as the cases; and therefore, it appeared to me necessary to examine that branch of the practice, which relates to the confession of an agreement, not in writing, notwithstanding a plea of the statute. I should think it a matter, not so much to be supported by a plea, as to be demurred too. Because the statute says, that an agreement, not in writing, shall not avail." After some further observation on

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the propriety of a demurrer in such case, he proceeds. "In the present decision, I go no further, than the cases before mentioned, analogous to the case in Ireland, (Whaley *v.* Bagnal) but a great deal stronger upon the point upon which my opinion rests. That case applies to a great variety of transactions, and admits that the agreement was not reduced to writing, but insists on a part performance. The bill was filed, and merely a plea of the statute put in, no answer; only an averment, that no writing was signed by either of the parties. The counsel on both sides agreed in the Law, according to the reason given on both parts of the case; for, in that case, the single question was, whether the plea sufficiently covered the facts stated in the bill. But it was said, that those facts amounted to a part performance. And the House of Lords were of opinion, that, upon the face of the bill, it was no part performance." Accordingly in the principal case, Lord Thurlow overruled the exception, the plea was allowed, and the bill dismissed, although the defendant had, in his further answer, confessed the agreement.

The case of Jordan and others *v.* Sawhins, so far as relates to the present question, was a bill for a specific performance of a parol agreement, for a lease of a public house, stating certain facts as a part performance. The statute of frauds was pleaded, without any answer to the parol agrement. Lord Chancellor Thurlow held the facts stated as a part performance, not to be such, and allowed the plea.

The next case was that of Redding *v.* Wilkes, in the same year. This was a parol agreement within the statute of frauds.. Certain facts stated were relied on as a part performance. The defendant demurred alone, probably relying on what was thrown out in the case of Whitechurch *v.* Bevis. It was held, by the Chancellor, that the facts stated in the bill and relied upon as a part performance, did not amount to part performance. And he allowed the demurrer.

It is then established, notwithstanding a contrary opinion may still be maintained, by the collectors and epitomizers of cases decided in the early times of the British statute, and even by some text writers of eminence, that the defendant, in such cases, may avail himself of the statute, either by plea or demurrer; unless in certain excepted cases, appearing on the face of the bill. I say certain excepted cases, because I think it probable that the case of part performance may be found not to be the only exception.

Where redress is given in the cases of part performance, the true ground, on which it is given, is that of fraud. Not that kind of fraud, which consists merely in the non performance of a promise; but something more. For instance, the vendor of an estate in land, by parol agreement, which, simply as such, he would not, taking advantage of the statute, be compelled to perform, suffers the vendee, in confidence of the agreement, to go into possession, and lay out his money in repairs and improvements on the purchased premises, and then refuses to fulfil the agreement: it is, and in great justice, considered to be a fraud: a fraud, of that kind, which gives a court of equity jurisdiction of the whole case, with all its circumstances. It is examined as a fraud, and the agreement is produced, not merely as an agreement, but as the instrument and mean of the fraud. And a specific performance of the agreement is decreed, as the only way, in which the person so defrauded, can have full and adequate redress. Therefore although, the case of part performance, has been treated as an exception out of the statute, yet it more properly belongs to the class of frauds, than agreements. It is a fraud practised under pretext of an agreement. But, in cases of part performance of parol agreements, to whatever class they may belong, a plea of the statute is not to be allowed. The part performance must however, to oust the defendant of his plea, appear distinctly on the face of the bill.

In all the cases which I have been able to find, the facts insisted on as a part performance, have been expressly so alledged: so were all the cases which have been cited. And also the case of Whitbread *v.* Wainwright, 1 Bro. C. C. 404, in which the plea of the statute was overruled, because it was multifarious. It is not, however, at present decided, to be absolutely necessary that part performance be expressly alledged in the bill; it may be enough, that sufficient facts are stated. But, at any rate, it must appear on the face of the bill to be such a case.

There is in this bill no express allegation of any facts as a part performance. Are there any facts sufficient to support such allegations? The statement is briefly,that on the 1st. day of October 1807, Perry, the intestate applied to the plaintiff for a loan of money, and proposed, as a security, to make an assignment of a lease, as already stated. That, induced by, and relying on this proposition (promise it is called in the bill) the plaintiff advanced him by way

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of loan 970,56 cents, for which he took Perry's promissory note, payable at the end of three years with interest, that is on the 1st day of October, 1810; and Perry faithfully promised the plaintiff to assign to him that lease, by writing under his hand on the back of the same, as security for the punctual payment of the principal and interest, of the note, on the first day of October, 1810, on the plaintiff's promising, that, on punctual payment, the lease and assignment should be delivered up to Perry. And if the money should not be paid by the day, the plaintiff was to go into quiet and peaceable possession of the premises contained in the lease.

To understand the matter fully, it may be necessary briefly to analyse the transaction. Perry made a proposition to the plaintiff, that if he would loan to him a certain sum of money, he Perry would assign to the plaintiff a certain lease by way of security. It is stated as a promise, but it is, in its nature, merely a proposition. Something held out, as an inducement to an agreement. And we see, that the final agreement was variant from, and extended beyond the terms of the proposition. The plaintiff advanced on loan to Perry $970,50 cents upon Perry's promissory note payable at a future day. Then follows the agreement or promise, on the part of the defendant, to assign the lease, under the stipulations before stated. The consideration for the promise was the loan so advanced by the plaintiff. Now to consider it as an agreement for the sale of the interest in the term, the whole purchase money was paid by the plaintiff, the vendee. How far has such payment been considered as part performance? In Lacon *v.* Martin, 3 Atk. 2. The purchaser having on a parol agreement, advanced several sums, for part of which he took a bond, in the mean time, Lord Hardwick, upon all the circumstances decreed a performance.

In Pengal *v.* Rose, on a parol agreement for a lease for twenty one years on a fine of £150, the purchaser paid £100, and the vendor gave directions for making a lease; it was held not to be such a part performance on one part, as to authorise the Court to decree a specific execution. There are several cases to be found on the same subject, equally at variance.

In this case, as in all the cases of part performance, a ground of fraud ought to be laid to entitle the plaintiff to relief. Had this principle been first adopted, and steadily adhered to, instead of placing it on part performance, depending on acts which frequently are, and

must be equivocal, affording proof of fraud or not, according to the attending circumstances, I am of the opinion, we should not have found so many apparent inconsistencies in the decisions of these cases. The question never ought to have been, is it a case of part performance? But does the part performance, with the attending circumstances, make a case of fraud, against which a court of equity ought to relieve? On this principle, I have considered the present case, and, taking the whole statement into consideration, I am not able to make it a case of fraud.

But let it now be considered what it really is, an agreement for a mortgage of real estate—a collateral security for money lent. The advance of the money by the plaintiff to Perry the intestate, on his promissory note, was the consideration. Here is certainly a good, valuable and legal consideration for the agreement. No agreements made without consideration, could ever have been enforced, either at law or in equity. Such agreement, needed not the passage of the statute; it was not intended to apply to them, but to certain agreements, which were good and valid, before the act. To all parol agreements, for the sale of lands, tenements or hereditaments, or any interest therein or concerning them, upon whatever good valuable and legal consideration they might be made. To give it a different construction would be, in effect, to repeal the law. But, it may be said, that this is a case of a contract executed. That indeed, will liken it to a case where the purchase money has been paid. It certainly goes no farther; and it admits, to me, the conclusive answer: no fraud is suggested in the bill, other than the general allegation, which is well answered by a negative as general. Nor do the facts stated in the bill amount to a fraud.

No time was appointed for the execution of the assignment, but the legal construction of the contract is, that it was to be done within a reasonable time, on request of the plaintiff.

It is very evident from a perusal of the bill, that it was the intention of the parties, that, on failure of payment, possession should be delivered to the plaintiff, and the property become vested in him, absolutely, and irredeemably. A failure was intended to operate not merely as a forfeiture at law, as in case of a mortgage, but of all right and equity of redemption. Now had this agreement been reduced to writing, and a bill had been brought to compel an assignment, the court would not have decreed it agreeably to that inten-

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tion. Forfeitures are odious, particularly in a court of equity. An assignment might have been decreed but with a defeasance, to operate as a common mortgage. This would have reserved to the assignor a valuable interest, the equity of redemption, of which he could not be deprived, but by a regular foreclosure. Not, that, had the agreement been carried into effect agreeably to this intention between the parties, it could have been set aside. It is one of those hard cases, not amounting to fraud, in which a court of equity would not interfere, neither, in the first instance, to carry it into effect, nor in the second, to set it aside.

It does not appear that the plaintiff, made any demand of Perry, the intestate, to make the assignment until the first day of October, 1810, the day on which the note became payable. It is stated that "on that day, Perry, having hitherto neglected, to pay the money due on said note, though often requested, then wholly refused to make said assignment, and your orator then and there, to wit, at Charlotte, aforesaid demanded of the said Perry to complete said assignment, and to give possession to your orator, or to pay the said sum of money contained in said note." These are the words of the bill. The demand of the possession here, coupled with a demand of the assignment to be made, was clearly premature. Perry had the whole of that day to pay the money. But it serves to shew the plaintiffs's understanding of the agreement—that the property was irredeemable. There was no offer of any condition of redemption, or to take the property in satisfaction of the money due on the note. In this connection, the plaintiff had not a right to that which he demanded. I am still speaking as though it had been an agreement in writing. And, taking the demand of an assignment as standing by itself, the plaintiff was not in equity entitled to it, without the offer of a clause of redemption to be inserted. And Perry might refuse to do that which equity would not compel him to do.

But it is not alledged that Perry refused to comply with the demand: it is no where averred that he did not make the assignment, or pay the money on the note, either then, or at some future day, during his life. It is stated that there was a neglect and refusal before, and up to the time of the demand; but there can be no transposition in this case—much less can such averment be dispensed with.

These observations are intended to apply only to the point under consideration—the question, whether there appears in the case, as

stated, any fraud, which can entitle the plaintiff to proceed on parol proof of the agreement, as a case of part performance, as it is called—a case excepted out of the statute. Nothing of the kind can be discovered.

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I will observe one thing further, (it has not had as it ought not to have, any influence on any part of the opinion in the case) that this is not wholly a case of parol agreement. The promissory note was a part of the agreement, and was in writing, signed by one of the parties, Perry. So that on the appearance of the note, the plaintiff could not, agreeably to the rules of evidence, which are as strict in this point, in a court of Chancery, as a court of law, be permitted to go into parol proof of any further agreement. On the whole, the plea both upon authority and principle must be allowed.

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On the admission of a prisoner to the liberties of a prison, who is confined under process from a court of the United States, the bond must be taken to the marshal of the district; if taken to the Sheriff of the county, it is void, and no action can be maintained upon it.

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THIS was an action on a gaol bond. Abel Turner had been committed to the gaol in Burlington, in the county of Chittenden, by the marshal of the district of Vermont, by virtue of an execution in favor of the plaintiffs, issued on a judgment rendered by the circuit Court of the United States, for the district of Vermont. And for the admission of said Turner to the Liberties of the prison, this bond, was, by Abel Turner, as principal, and Sylvester Russel as surety, executed to the Sheriff of Chittenden County, as the keeper of said prison. Abel Turner committed an escape, and the Sheriff assigned the bond to the plaintiffs, the creditors, who, as assignees of the Sheriff, commenced this action on the bond against Sylvester Russel, the surety.

There was a general demurrer to the declaration.

Charles Marsh for the defendant, in support of the demurrer, took two exceptions to the declaration. 1. It does not appear by the declaration, that Abel Turner was, by law admissible to the lib-

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erties of the prison. The act concerning gaols and gaolers, sect. 10, gives to prisoners, the privilege of the liberties of the prison, and authorises the Sheriff as keeper of the prison, to take such bond; but the act extends only to a person imprisoned in gaol on mesne process in any civil action, or upon execution, founded upon an action of debt, covenant, contract or promise. The privilege is not general, but is confined to the cases specified in the act. An admission of a prisoner to the liberties of the prison, in any other case, is illegal, and, consequently the bond taken in such case, is void. If, however, it be granted, that the Sheriff, as the marshal of the Kings bench in England, may keep the prisoners confined for debt, within the liberties of the prison, and may take bonds for his own security, yet, such bonds, not being within the statute, are certainly not assignable.

2. Abel Turner was committed, under process from the Circuit Court of the United States; he was therefore, a prisoner of the marshal of the district of Vermont, not of the Sheriff of the county; and the bond should have been taken to the marshal. The laws of this State, and of the United States, on this subject, have not transferred the legal custody, or the ultimate liability, from the marshal to the Sheriff. Statute of Vermont, concerning gaols, Compiled Laws, 289, 290. United States Laws, 3, 335, relating to the liberties of prisons, 2, 289, providing that the marshal going out of office, shall deliver over prisoners to his successor, 2, 204, regulating the fees of the Marshal. The Sheriff is not liable for the escape of a prisoner, committed by the marshal, but the marshal is made liable, U. S. L. 1, 362. Such also has been the practical construction of the statutes; bonds have in such cases, heretofore, been taken to the marshal, he has assigned them in cases of escape, and suits have been maintained, in the courts of the United States, on such assignments, in numerous instances. If those suits were properly brought, the present action cannot be maintained.

Van Ness and *Starr* for the plaintiff. The first exception cannot prevail on a general demurrer; it is to be presumed, that the officer has done his duty, that the prisoner, was by law entitled to the liberties of the prison. This bond and the declaration upon it, are agreeable to the practice; and, indeed, agreeable to the apparent intention of the legislature. The condition of the bond is given in the statute, 1 Com. L. 283. By the form of the bond there given

the nature of the action is not inserted, nor was it intended that it should be inserted.

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The second exception, that the bond should have been taken to the marshal, instead of the Sheriff, we apprehend cannot prevail. That by the resolution of Congress, and the law of this State, made in compliance therewith, providing for the safe keeping of prisoners, committed under the authority of the United States, the Sheriff of the county where the prisoner is committed, is, as keeper of the gaol, sole keeper of the prisoner. The prisoner, when committed, is no longer the prisoner of the marshal, but of the Sheriff. The marshal is, in no sense, the keeper of the prison, and has no control over the prisoner; he is not accountable for his escape, but the Sheriff is accountable. The bond must, therefore, be taken to the Sheriff, who, and not the marshal, is to be indemnified. The consequence is, that the bond, in this case, was legally taken, and legally assigned by the Sheriff, and the action well brought.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. The first exception, taken by the counsel for the defendant, in support of the demurrer is, that, as the keeper of a prison, is not by statute, in all cases of a commitment on civil process, to admit the prisoner to the liberties of the prison, but in particular cases only, it ought to appear to the Court, on the face of the proceedings, that the bond was taken in a case, in which the statute authorises the admission of the prisoner to the liberties of the prison. The reasoning of the defendant's counsel, in support of this exception, is agreeable to the general principles of law, settled in analogous cases; but it has been well observed, by the council for the plaintiff, that a fair construction of the act in this case will lead to a different result—that it was not the intention of the legislature that the nature of the action should be inserted in the condition of the bond. The statute giving the form of the bond, with the condition, takes no notice of the nature of the action on which the judgment was rendered, and has provided no means of information to the Sheriff. But by an act, passed on this subject, on the 23d of October, 1807, the legislature have made a provision, which leads to a construction, different from that urged by the defendant's counsel. Instead of a certificate of the nature of the action, in case of a judgment in an action of debt, covenant, contract or promise, the clerk,

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or magistrate, issuing an execution, is directed, in actions on gaol bonds, all actions on the case, not founded on contract or promise, and all actions of trespass, to certify the nature of such action on the execution. The view of the legislature, in making this provision, was to give notice to the Sheriff, that the prisoner was not admissible to the liberties of the prison. There has been no instance of inserting in the bond or declaration, the nature of the action, in which the judgment was rendered, and, it is believed that the exception has never before been taken, certainly, if taken it has never prevailed. There is no inconvenience in the practice, and, to permit the exception now to prevail, would be productive of great injustice.

The second exception is a very weighty one, and, considered as depending on the construction and effect of the eighteenth section of the act of this state, concerning gaols and gaolers, involves questions of some difficulty. That section of the act constitutes certain gaols therein mentioned to be gaols, for the safe keeping of such prisoners, as shall be committed, under the authority of the United States, until discharged by due course of the laws thereof. And the keepers of said gaols are required to receive such prisoners, and are subjected to the same pains and penalties, for neglect of duty therein, as they are, in case of prisoners committed under the authority of this State. The gaol in Chittenden county is not named in this act, which was passed in the year 1797. In November, 1799, an act of this State was passed constituting the gaol in Burlington, in the county of Chittenden; and in Danville, in the county of Caledonia, gaols for the reception, and safe-keeping of prisoners committed under the authority of the United States. This act has no reference to the act of 1797, and contains no clause imposing any duty or liability on the keepers of the goals. This seems to have been wholly overlooked, by the council on both sides; and, yet on this act, perhaps the present question might be decided, with little reference to the points which have been made in the argument. But, as it is a cause of considerable interest and expectation, the Court have considered it on the points which have been made.

It is urged on the part of the defendant, that a prisoner, committed under process of the Courts of the United States, remains a prisoner to the marshal; that the keeper of the prison is to keep the prisoner, subject to the laws of the United States. That, however liable the Sheriff, as keeper of the prison, may be for gross and wil-

ful neglect, in suffering the prisoner to escape, yet, he is not liable for an escape from the liberties of the prison, after the prisoner has been legally admitted to such liberties: for the law of the United States, which has, in this instance, adopted the provisions of the State law, has placed the prisoner beyond his control—has put it out of his power to prevent an escape. That neither the Sheriff nor the creditor is turned over to another jurisdiction, by means of a bond given for the continuance of the prisoner within the liberties of the prison. That it would also be throwing an additional burthen on the Sheriff, the risk of the insufficiency of the bail, in case of an escape, and that, without any compensation. It is urged in answer, that, by force of the resolve of Congress and the statute o this state, to which reference has been made, all the duty and liability is devolved on the Sheriff, who is the only keeper of the prison of his county known in the law. That he is not only to receive, but safely to keep all prisoners, committed under the authority of the United States, under the like pains and penalties, as he is liable to, in case of prisoners, committed under the authority of this State. That he is not discharged from his duties and his liabilities, by the admission of a prisoner to the liberties of the prison; he is, therefore, liable for the ultimate sufficiency of the bail; consequently, the bail or surety must be to his acceptance, and taken in his name.

How far any one of the United States might be empowered, by special act of Congress, to alter the course of proceedings, under the laws of the general government; and, by its own laws, to give final effect to the judicial process of the Courts of the United States—to change the resposibility from the officer of the United States, to its own; and oblige suitors in those Courts, to resort to an other set of officers, under a different authority, or even to a different tribunal, for the final execution of judgments, which they may have obtained, it is unnecessary now to decide; but certainly it cannot be done without express and mutual provisions.

The joint resolution of Congress of the 23d of October, 1789, is the only provision on this subject, on the part of the United States. That resolution recommends, or, in other words, gives authority to the several states, to make it expressly the duty of the keepers of their gaols, to receive therein, and safely keep, all prisoners committed under the authority of the United States, until such prisoner shall be discharged, by due course of law, by the authority thereof,

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that is, the authority of the United States, under the like penalties, &c.

This goes no further, than to authorise the several states to grant the use of their gaols to the United States, and to compel the keepers of such gaols, to exercise the same office, and perform the same duties of keeper of prisoners, committed under the authority of the United States, as they exercise and perform in keeping prisoners committed under the authority of the State; the prisoners to be kept under the same laws and authority under which they are committed. The act of this State, in the sections referred to, goes no farther. If it did go beyond this, it would be unauthorized and void. The act does not extend to the Sheriff of the county *quasi* Sheriff; it extends not to the mere legal, but to the actual keeper of the gaol; so the legislature clearly understood it. In the 19th section of the act, page 290, is this proviso. "That no county, Sheriff, deputy Sheriff or gaoler, shall be answerable for the escape of any prisoners, through the insufficiency of the gaol, who have been committed, by and under the authority of the United States; that is the Sheriff, if he keep the gaol in person, or his deputy, if kept by a general deputy, or by the gaoler, if kept, as is commonly the case, by a person specially appointed for that purpose. Such appears to be the only fair and consistent construction to be put on the acts of the two governments.

Another act of Congress has been mentioned, as having a strong bearing on the present question; U. S. L. 3, 335, "an act for the relief of persons imprisoned for debt." By the first section of this act it is enacted, "that persons imprisoned on process issuing from any court of the United States, in civil actions, shall be entitled to the like privileges of the yards or limits of the respective gaols, as persons confined in like cases on process from the courts of the respective states, are entitled to, and under like regulations and restrictions." It has been urged that, to comply with this act, "under like regulations and restrictions," the bond must be taken to the Sheriff, because such is the regulation of the laws of this State. That is, that the word, "like" shall be construed to mean, identical; but this is not the true construction. The only obvious and rationa construction is, that a like bond shall be taken on the admission of such prisoner to the limits; and to the officer standing in the like relation to him, as the Sheriff does to a prisoner, committed unde the authority of the State.

The act of this State, constituting the gaol in Burlington, a gaol for the keeping of prisoners, committed under the authority of the United States, is in these words. "Be it enacted, &c. that the common gaol, in Burlington, in the county of Chittenden; and the common gaol in Danville, in the county of Caledonia, in addition to the purposes for which they are now used, shall be gaols for receiving and safe keeping of such prisoners, as shall be committed under the authority of the United States, until they shall be discharged by due course of law."

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There is no duty or liability implied by this act on the keepers of those gaols, or any other person, either by any expression in the statute, or by reference to any other act. No power or authority is thereby given to the Sheriff of the county, or to any subordinate officer, in relation to the prisoners committed to those gaols, but what may be implied in the expression, that these gaols shall be gaols for the safe keeping of prisoners, &c. To draw from this all the consequences, which have been contended for, would be too great a stretch of construction. It may be said to be an omission, but it is an omission which this Court cannot supply. On no ground, therefore, can this action be sustained, and there must be

Judgment for the defendant.

HAZARD *vs.* SLADE, Sheriff.

In an action against the Sheriff, for taking insufficient bail, on mesne process, if the defence be, that the bail was sufficient, when taken, it is necessary for the defendant to prove, that the bail when taken had a substantial property, amply sufficient to answer the demand, and that would probably continue so; proof that the bail were ostensibly, but not really possessed of sufficient property, will not exonerate the Sheriff.

THIS was an action against the defendant, former Sheriff of Addison county, for taking insufficient bail on mesne process, at the suit of the present plaintiff, against M. Hull.

Addison, January, 1814.

Plea—*the general issue.*

On trial the plaintiff proved the insolvency of both the principal and the bail, and the consequent loss of his debt.

Addison, January. 1814.

Hazzard vs. Slade.

Seymour and *Doolittle* for the defendant, stated that at the time the bail were received by the Sheriff, they were sufficient, and therefore, by the act passed the 7th of November, 1806, the Sheriff is not liable in this action.

The evidence produced on the part of the defendant, proved, that J. Hull and W. Hull at the time they were received as bail by the Sheriff, were possessed of personal property amply sufficient to pay the plaintiff's demand, but they were not freeholders. On a cross examination it appeared that they were deeply in debt; and that their personal property consisted principally of cows and other cattle which they had taken on hire, and which were shortly after returned.

The Council for the defendant contended, that if the bail at the time they were received by the Sheriff, were ostensibly sufficient, it is all the law requires, and the Sheriff is not liable.

By the Court. It must be a real, not merely an ostensible sufficiency. The words of the statute are, "The officer serving such process, (attachments on mense process) shall not be made liable for the insufficiency of such surety or sureties, if he shall, on trial, make it appear that, at the time of receiving such said surety or sureties, the same were amply sufficient. A mere ostensible sufficiency will not excuse, it must be real and ample, a substantial responsibility in point of property, and such as would probably continue so, to answer the demand.

Verdict for the plaintiff.

PATTERSON *vs.* PATTERSON.

A deposition taken in another State, cannot be admitted, unless it appear that the magistrate before whom it was taken, was authorized to take depositions, by the laws of the State where it was taken.

Addison, January. 1814.

IN this case several depositions, were offered in evidence, which were taken before Nathan B. Graham, Notary Public, in the city of New York. The Court thought that a Notary Public, in the State of New York, had no authority to take depositions, and directed the laws of the State of New York to be produced. No such authority

was found to be given to Notaries Public, by the laws of that State. By an act of that State, Vol. 1, page 78, the judges of the Supreme Court of the State, the judges of the County Courts, and the Chief Magistrates of any city, are authorized to take depositions to be used in other States, but no such authority is given to Notaries Public. The depositions were rejected.

Addison, January. 1814.

Patterson vs. Patterson.

STRONG *vs.* PAINE.

The Governor's Rights, so called, being five hundred acres of land, granted or reserved to Benning Wentworth, in each township in this State, granted by the governor of the late province of New Hampshire, are by the Charters located and granted in severally, in *lieu* of two shares. If, therefore, such lot, or any part thereof, be cut off by a prior grant, the owner of such lot has no right, a the owner of two shares in common, to a compensation out of other lands in the town, to make his quantity of land equal to two shares, or to make up the quantity of five hundred acres.

THIS was an action of ejectment for fourteen acres of land in the town of Panton, described as part of the Governor's Right.

Addison, January. 1814.

Plea—*the general issue.*

On trial, it appeared in evidence, that on the third day of November, 1761, Benning Wentworth, governor of the late province of New Hampshire, granted the township of Panton to the usual number of proprietors, as tenants in common, to be divided to and amongst them in equal shares, except Benning Wentworth, to whom was granted a tract of land, as marked B. W. on the back of the Charter, containing five hundred acres, to be in lieu of two full shares. On the back of the Charter was drawn a plan of the township; and, in the southeast corner of the plan, was drawn a small square, including the letters B. W. adjoining Otter creek, which was the east boundary of the township.

Benning Wentworth, by will devised to his wife Martha Wentworth, all his estate real and personal, whatsoever and wheresoever, and died in the year 1770, the will was duly proved; and soon after, Martha Wentworth was legally married to Michael Wentworth. Michael and Martha Wentworth, on the 25th day of June, 1783, sold and conveyed to Thaddeus Munson, the tract of land granted

Addison, January, 1814

Strong *vs.* Paine.

to Benning Wentworth in Panton, described as the governor's lot in said town.

The township of Addison, which lies south of Panton, the grant of which was prior to that of Panton, cut off from the south part of Panton more than one half of the land, comprehended in the grant of the township; and, in such manner, the township of Addison not being bounded east by Otter creek, as to leave in the southeast corner of Panton, at the place marked B. W. on the plan, a slip of land containing one hundred and twenty five acres, of which Munson took possession, as part of the Governor's Right. The east line of Addison, running northerly in the west line of the above described slip of land, crossed the Creek, making the northeast corner of Addison, on the east side of the creek. The north line of Addison, running from the northeast corner, westerly to lake Champlain, crossed the creek, separating the above described slip of land from the remaining part of the town of Panton.

On the 26th day of March, 1802, Thaddeus Munson, surveyed in the southeast corner of Panton, so made by the intersection of the north line of Addison, with Otter creek, 335 acres as the remainder of the Governor's Right, making up 500 acres. This survey included a lot claimed by Strong the plaintiff, and then in his possession; and also 14 acres part of a farm, claimed by the defendant Paine, and which he had possessed for more than twenty years. It also appeared that Thaddeus Munson had brought an action of ejectment against Strong, the present plaintiff, and included in that action the 14 acres so possessed by Paine, and now demanded in this action. Although the present defendant Paine, was not a party to that suit, yet Munson recovered against Strong, for the whole tract, described in his declaration. After the recovery in that action, Munson sold to Strong the whole of the land so recovered.

Dolittle for the plaintiff, offered in evidence, the record of the judgment, in the action of ejectment in favor of Munson against Strong, which was rejected by the Court, as *res inter alios acta.*

Dolittle then contended, that the plaintiff had shewn a good title to the land demanded.—That the place where Thaddeus Munson, who owned the Governor's Right in Panton, had made his survey including the land demanded, was, as it had fallen out, the southeast corner of the township of Panton; and answered the descrip-

tion in the grant.—That he was entitled to 500 acres, which by the grant he was to have in lieu of two whole shares, although less than the usual quantity of two shares.

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D. Chipman for the defendant. It is admitted that the plaintiff has shewn a clear title to a tract of land, granted to Benning Wentworth, in the township of Panton, called the Governor's Right; and the only question is, whether the land demanded, is a part of that Right or tract.

By the Charter of the township of Panton, the Governor's Right was not granted, to be holden in common with the other proprietors, but was clearly granted in severalty, and located in a particular place, in the southeast corner of the township. Suppose, that the prior grant of Addison had extended still farther north, and taken the whole township of Panton except the slip of land in the southeast corner; would the other proprietors of Panton, have held that slip of land in common with the owner of the Governor's Right? There could be no foundation for such claim. The right must be holden as it was granted in severalty. And if curtailed, as in this case, the owner of the right must abide by the grant as made, and hold it as located by the Charter. He can have no claim to make up the quantity out of lands granted to the other proprietors as tenants in common.

By the Court. The grant in this case, to Benning Wentworth of the tract, commonly called the Governor's lot, was a grant of a tract of land in severalty. It was, in and by the Charter, located and fixed, as much as though it had been granted by metes and bounds, in a separate and distinct Charter, prior to the grant of the township of Panton, and without any reference to it. If Benning Wentworth's title fail to a part or the whole of the lot, by reason of a prior grant of the same tract, there can be no right to a compensation, to be taken out of lands granted to others. Had, in this case, the governor's lot have been marked, or severed in the northeast, instead of the southeast corner of the township, the grantee must have holden the full quantity of 500 acres, although the other grantees have not half the quantity intended to be granted to them. Such are the legal, and such are the fair and just consequences of taking the grant in this manner; as the grantee may have the advantages in the one, case, so he must abide by the disadvantages in the other. Verdict for the defendant.

Addison, January, 1814.

JUDD *vs.* LEONARD.

An action of ejectment will not lie for a right of way, or other easement.

THIS was an action of ejectment for a small tract of land, on the west side of Otter Creek, in the village of Middlebury, described by metes and bounds.

Plea—*the general issue.*

It appeared in evidence, that Appleton Foot, being the owner of a larger tract of land, including the premises, had, in the year 1798, conveyed to Joseph Cook and Anthony Rhodes, a small tract, fifty feet square, with a right of way thus described in the conveyance. "With a right of way from the highway to the easterly end of the small tract, fifty feet square, between the house of the grantor (now Leonards) and the coal house bank, sufficient to pass and repass with carriages, &c. The plaintiff, by several mesne conveyances, had become the owner of the small tract, with the right of way thereto. And the defendant, had, in like manner, become the own er of the larger tract, formerly owned by Appleton Foot, subject to the plaintiff's right of way. The defendant, by erecting buildings encroached upon the passage, so as not to leave sufficient room for passing. The land demanded by the plaintiff, was that, over which he had this right of way. Upon this evidence the Court expressed an opinion, that an ejectment was not the proper remedy in this case, to recover an easement—a mere right of way.

The council for the plaintiff contended, that an action of ejectment would lie in this case. That at common law, the owner of the land adjoining a highway, who is considered as the owner of the soil of the highway, may maintain an action of ejectment, against a person encroaching upon, or inclosing any part of the highway. Ch. J.—That is the case in England, and, I presume in this State also, but that is a very different case from the present. There, the plaintiff is the owner of the soil of the highway, in which the king has an easement for all his subjects, and the recovery in ejectment is had subject to that easement. If the owner of the soil encroach, no ejectment will lie against him; there are other remedies for the public. If the plaintiff can, in this case, maintain his action of ejectment, although entitled to an easement only, a right of way over the

land demanded, yet he will recover the soil itself. For such with us is the consequence of a recovery in this action, in which the land itself, not merely the easement, is demanded; and a recovery in this case, will give the plaintiff, not the easement only, which he has a right to claim, but the fee of the land. The remedy, at common law, in such case, was by assise. Whereupon the plaintiff suffered a nonsuit, to be set aside if the Court should be of opinion that the action could be supported. Afterwards, when the action was again called, the plaintiff's council declared that they were satisfied that the action could not be supported. That at common law, asise, and not ejectment, was the proper remedy in such case.

Addison, January. 1814.

Judd vs. Leonard.

The Town of MIDDLEBURY *vs.* the Town of HUBBARDTON.

An action of general *indebitatus assumpsit*, for monies paid, laid out and expended, will not lie in favor of one town against another, to recover for monies expended for the support of a pauper. The action in such case must be brought on the statute, stating a case within some one of its provisions.

THIS was an action of *indebitatus assumpsit*, for monies paid, laid out and expended by the town of Middlebury, for the support of Clarrissa Pier, a pauper, who was taken sick in Middlebury, and whose legal settlement was in the town of Hubbardton.

Addison, January. 1814.

Plea—*the general issue.*

D. Chipman for the plaintiff, stated, that the pauper, whose legal settlement was in the town of Hubbardton, being a hired servant in Middlebury, was there taken sick about the first day of November, 1811. That on the third day of the same November, an order was regularly made by two justices, to remove her to the town of Hubbardton. That on the recovery of the said pauper, and as soon as she was able to be removed, to wit, on the 9th day of the same November, she was in pursuance of said order of removal, removed by the town of Middlebury to the town of Hubbardton. That a bill of the expense, paid by the town of Middlebury, for her support while sick there, and of the expense of her removal, was, on the same 9th day of November, presented to the Overseers of the poor of the

Addison, January. 1814

town of Hubbardton, with a demand of payment, and, that payment was refused.

Middlebu'y *vs.* Hubbardt'n

Edmond for the defendant. The action in this case should have been brought on the statute, it will not lie at common law. It is true that there is a general provision in the statute. that each town in this State shall support their own paupers; but this does not enable a town, at their option, to support the pauper of anoher town, and recover the expense of the town where the pauper belongs. On the contrary, the statute has very carefully and very wisely protected towns against such charges. And no town can be made chargeable for the support of their paupers, except in the cases provided for by the Statute, and by pursuing the steps, therein pointed out, in each particular case. If we are correct in this, it follows, that an action of *indebitatus assumpsit*, will not lie in such case. It is necessary that the action be brought on the statute, making out a case within some of its provisions. But, in this case, the declaration appears to have been made with a view to a case under the eleventh section of the act, and the statement of the evidence makes out a case under the fourth section. As the action, therefore, can on no ground be supported—the plaintiff ought to be nonsuited.

Doolittle for the plaintiff. It is not necessary in this case to declare upon the statute. The declaration is for monies paid, laid out and expended, by the town of Middlebury, for the sapport of a pauper, who belonged to Hubbardton, whose duty it was to support her. The town of Hubbardton are therefore liable upon the principles of equity and good conscience to refund the money—at any rate, it is sufficient for the plaintiff to make out a case within any one of the provisions of the statute.

CHIPMAN, Ch. J. deliverered the opinion of the Court. The third section of the act, providing for the support of the poor, makes provision for the removal, to the place of his last legal settlement, of a person residing in a town, and who is likely to become chargeable to such town; such removal is to be made at the expense of the town, making the removal. The fourth section provides for the removal of a person resident in a town, who, by reason of sickness cannot for a time be removed; and gives the town, incurring the charge of his maintainance, a remedy for the expense of the sickness, and also of the removal, if removed on recovery, against the town of such persons last legal settlement.

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The eleventh section provides for the case of a transient person suddenly taken sick or lame, and in need of relief. The town where such persen is so taken sick or lame, are to provide for his support; and, if he be not of sufficient ability to defray the expense of his support with the contingent charges, the overseers of the poor of such town, may recover the same, by an action for monies paid, laid out and expended, from the town or place of such persons last legal settlement. It will be seen that the fourth section gives no particular action, it must therefore be a special action on the case upon the Statute. The eleventh section gives an action for monies paid, laid out and expended. But a general *indebitatus assumpsit*, or monies paid, laid out and expended, will not lie. A case must be made in the declaration, within this section of the statute. It must be stated that the person provided for was a transient person suddenly taken sick, or lame as the case may be, in the town, and not of sufficient ability to defray the expense of his support, with the contingent charges; and averring, the town on which the demand is made, to be the place of his last legal settlement. All this is necessary to raise the liability under the statute, and to distinguish it from cases arising under the fourth section. In declaring on a case under the fourth section, it must be averred that the pauper had come to reside in the town, had become chargeable and was unable to be removed; and the declaration must also set forth the sums expended for the support,and the expense of removal, if after a recovery actually removed; that the account was presented and payment refused.

It has been well observed by the council for the defendant, that an action will not lie at common law, against a town for the support of their paupers, by any other town; and it is equally clear, that such action cannot be maintained on the general provision in the statute, declaring it to be the duty of each town to support their own paupers, for the statute has pointed out, in what particular cases, they shall be liable to another town for their support, and what step, must be taken to render them liable. The declaration in this case does not come up to either of the cases provided for by the statute. It comes nearest to the case provided for by the eleventh section, but the case, as stated by the plaintiff's counsel, is a case under the fourth section. The action cannot be supported; there must, then, be a nonsuit.—Farrand and Hubbard, justices concurred.

Addison, January. 1814.

GALE *vs.* BONYEA.

In a case for uncertain damages, if the sum in damages found by the jury, be within the jurisdiction of a justice of the peace, the county court is not thereby ousted of jurisdiction.

THIS was an action on the case against the defendant, who was a house joiner, for having done the joiner work of a house, which he had undertaken for the plaintiff, in an unworkman-like manner, *ad damnum*, $200,00.

On a trial in the County Court, the jury found a verdict for the plaintiff, for twenty dollars damages. Whereupon, on motion of the defendants counsel, the Court dismissed the action on the ground, that the demand, ascertained by the jury, appeared to be within the jurisdiction of a justice of the peace.

The plaintiff entered an appeal to this Court, and the cause was submitted on the question of jurisdiction.

The Court, without hearing the plaintiff's counsel, were clearly of opinion that the County Court had jurisdiction of the action. That, in actions for uncertain damages, the finding of the jury can, in no case, oust the County Court of jurisdiction.

WHEELER *vs.* SHED.

The action of general *indebitatus assumpsit*, is an equitable action, and the plaintiff can, in no case, recover more than he is in equity and good conscience entitled to.

Rutland, February. 1814.

THIS was an action of *indebitatus assumpsit*, for use and occupation.

Plea—*the general issue.*

On trial to the jury, it appeared in evidence, that one Downs, who was the owner of the premises, had mortgaged the same to A. and B. of Boston; the time of payment had expired. An action of ejectment had been brought by A. and B. on their mortgage against Downs, in the Circuit Court of the United States. Pending that action of ejectment, on the 15th day of March, 1811, Downs leased

the premises to the plaintiff for one year. And on the same day, the plaintiff leased the premises to the defendant for one year, at a rent of $54, and the defendant went into possession.

Rutland, February. 1814

Wheeler vs. Shed.

In the month of May following, A. and B. obtained judgment in their action of ejectment against Downs; took out a writ of possession; and on the second day of June following, the defendant was by that writ put out of possession.

CHIPMAN, Ch. J. directed the jury, that in this, which was an equitable action, they should find for the plaintiff so much, and so much only, as the defendant ought in equity to pay for the use and occupation of the premises, while in possession. That as the defendant had been put out of possession, by a title prior to that of the plaintiff, and an end put to his occupation of the premises, the plaintiff could make no demand for the use of the premises thereafter.

And that they might, and ought also to consider, whether, as the defendant had been thus turned out of possession; and that, after it must be supposed he had made preparation for crops, which he could neither reap nor enjoy, the occupation which he had under the plaintiff, was on the whole beneficial to the defendant. And that, if they found that, under all the circumstances, the defendant had received no benefit from the occupation of the premises; the plaintiff was not entitled to recover.

Verdict for the defendant.

FAIRHAVEN TURNPIKE CO. *vs.* FRENCH.

To support an action in favor of a Turnpike Company, on a special contract, for the sale of a certain number of shares in their Company Stock, it is necessary to prove that the Company Stock had been divided into a certain number of shares, either by the act of incorporation, or by the act of the Company.

Addison, February. 1811.

THIS was an action of *assumpsit*, on a special contract, for the sale by the plaintiffs, to the defendant, of three shares in their Company Stock. The declaration alledged, that on the 17th day of September, 1807, the defendant undertook and promised the plaintiff's, in consideration that the said Company should proceed and

Rutland, February. 1814.

Turnpike Company vs. French.

make and complete the road, agreeably to the provisions of the act, incorporating said company, that the defendant would take three shares in the stock of said Company, and would pay therefor the sum of seventy-five dollars, per share amounting in the whole to the sum of two hundred and twenty-five dollars. One fifth part of the purchase money to be paid, as soon as it should be proper to begin the work on the road the spring following; one half of the remainder by the first day of October, 1818, and the residue by the first day of October, 1809, or as soon as the road should be completed. The plaintiff's then aver in the declaration that they had divided their Company stock into a certain number of shares, that the road was completed on the 12th day of June, 1811, and on the same day accepted by the judges of the Supreme Court, agreeably to the provisions of the act of incorporation; and that the defendant had not performed, though often requested and demanded, especially at Fairhaven, on the 2d day of October, 1812.

On trial, to the jury, upon the general issue, the act of incorporation was produced by the plaintiffs. The company stock was not by the act divided into shares, but the company were by the act authorized to make such division. A written contract was also produced, and proved to have been executed by the defendant, of the same tenor as set forth in the declaration.

In the course of the trial it was made a question, whether it was necessary on the part of the plaintiff's, to prove the averment in the declaration, that the Company stock had been divided into shares.

Langdon for the defendant, contended the averment was of a fact necessary to be proved to support the plaintiff's action; at any rate, it was not an impertinent averment, and therefore, having been made in the declaration, the plaintiff was bound to prove it.

On the first point he insisted, that as the Company stock, was not by the act of incorporation divided into shares, it could be done only by the act of the company. If there had been no such act of the company, they had undertaken to sell that for a certainty, which was wholly uncertain, or, rather that which they had not in any disposable shape; certainly not in the shape in which they had contracted to sell. The shares in the company stock, are the only consideration for the contract, if there were no such shares, there was no consideration for the defendant's promise. Certainly the value or amount of the consideration was at the mercy of the com-

pany; for it was thereafter in their power to make a share to consist of ten dollars of the stock of the Company, instead of seventy-five, the price to be given by the defendant. Such act would be fraudulent in the company and avoid the contract.

But if it were admitted that the averment, in the declaration, that the Company stock was divided into shares, was unnecessary, yet it cannot be considered as impertinent. When shares in the joint stock of a Company are sold, it cannot be impertinent to averr that the stock has been divided into shares; it being the only mean by which the quantum, proportion or value of such shares can be known. And it is a rule, that if an averment be made by the plaintiff in his declaration, which is not impertinent, although it was not necessary to have been made; yet he shall be holden to prove it. Peak's Ev. 185, 206. Doug. 667, Bristow *v.* Wright. 1 Chit. 293. 2 East. 452. 3 Bos. & Pul. 458.

Mallary for the plaintiff contended, that, the averment in the declaration, that the Company stock had been divided into shares was not necessary to make out the plaintiff's case, and therefore it is unnecessary to prove it. On reading the declaration it is evident that it would have been good without this averment. It is unnecessary to shew that the stock was divided into shares, as the defendant in his contract named the shares, and this makes them a valuable consideration.

In the case Winn *v.* White, Bl. R. 840.—The plaintiff having set out his title different from what it was in fact, the Court held that it was an immaterial averment, which need not be proved. So in 1 Chit. 231, an averment wholly foreign, need not be proved. It may be struck out, unless, if struck out, it will leave the declaration defective. In the case Savage Quitam *v.* Smith, 2 Bl. R. 104, there was an unnecessary recital of a judgment in the declaration, but it was so connected with what was necessary, that it could not be stricken out without rendering the whole declaration imperfect. That is not the case here, the averment is unconnected with any material part of the declaration—strike it out, and the declaration remains perfect.

Chipman, Ch. J. delivered the opinion of the Court.

The averment that the Company had divided their stock into shares, certainly is not an impertinent averment in this case. The

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Company stock could be divided into shares, in this case by the act of the Company only. A share in the stock of a Company, has reference to an aliquot part of the Stock. What that aliquot part is, must be determined and known, in order to know the quantity of interest, to which each member, owning a certain number of shares is entitled, and the rights of each member, as a constituent part of the Company. The aliquot parts of the Company stock are not ascertained by the act of incorporation; but, by the seventh and eighth sections of the act, we see it was contemplated, that the stock or interest of the proprietors or members of the Company, should be ascertained and known by shares, which is left to depend on some act of the Company. Now what do the Company sell, or what does the purchaser buy, without something to which it may be referred for ascertainment? Who is to determine whether it is to consist, of a tenth, a hundreth or a nintieth part? Had the shares been sold as certain aliquot parts, as three hundredth parts, for instance, it would have been sufficient. Any further averment might have been unnecessary: because such disposition of the stock, by the Company in certain proportions of the whole, would of itself have been a sufficient act of the company—a sufficient ascertainment of the shares. And perhaps, proof of such sale might be sufficient proof of the averment in this declaration, of the division of the stock into shares. But as no such mode was adopted, the averment does not seem to be unnecessary.

There is certainly a distinction between an averment merely unnecessary, and an impertinent averment. An averment of a particular fact, which would be supplied by a general presumption, is merely unnecessary, as in a declaration on a promissory note. The general averment of value received, is a sufficient averment of a consideration, and it will be presumed that there was a sufficient consideration for the promise. Under this averment it is unnecessary to aver of what particulars the consideration consisted. But, if the plaintiff in such case, go on to aver a particular consideration, as a horse sold and delivered, money paid &c.; the fact, though unnecessary to have been averred, must now be proved. But if he go farther and aver also that the horse was bred by A, or that the money was brought from Europe, it is wholly impertinent. The fact, who bred the horse, or whence the money was brought, cannot have any relation to the consideration between the plaintiff and de-

fendant, it may be rejected and need not be proved: but whether the horse was sold, or the money paid, is of the very essence of the consideration; but which consideration would have been taken on the general presumption as good, under the general averment, had the particular averment been omitted.

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In the present case the Court are of opinion, that this averment is not of a fact impertinent, but of a fact, which at least must have been presumed from some ground—that the Company had divided their stock into certain ascertained shares—that in selling the shares they sold known portions of the stock. The prooff cannot, therefore, be dispensed with.

On which the plaintiff's became non suit.

Clark *vs.* Todd.

A declaration in *assumpsit* on a special contract to deliver cloth to the plaintiff, is not supported by evidence of a contract to deliver cloth at the defendant's Factory, but the variance, between the declaration and the contract proved, is fatal.

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THIS was an action of *assumpsit*, on a special contract. The declaration set up a contract to deliver a certain quantity of cloth to the plaintiff, generally, without mentioning any place of payment. On trial upon the general issue, the plaintiff produced a written contract, by which the defendant had, engaged to deliver to the plaintiff, the quantity of cloth stated in the declaration, at the defendants Factory in Poultney.

By the Court. The plaintiff has declared on a contract, by which the defendant promised to deliver to the plaintiff a certain quantity of cloth, that is, according to the legal effect of the contract, to deliver the cloth to the plaintiff, at his, the plaintiff's place of abode, the contract proved is for the delivery of the cloth at the defendant's Factory in Poultney, the variance is fatal.

The plaintiff suffered a non suit.

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HAY *vs.* HIDE.

A due bill, in the following words, "Due F. H. eighty dollars on demand," will support an action of *indebitatus assumpsit* for money lent.

THIS was an action of *assumpsit*. The declaration contained two counts; one on a promissory note, and one for money lent.

Plea—*the general issue.*

Mallary for the plaintiff, in support of the action offered in evidence, a note or due bill in the words and figures following. "Due to Francis Hay eighty dollars on demand, 19th June, 1819."

A. W. HIDE.

Langdon for the defendant contended that the evidence offered, would not support either count, in the declaration. Though the due bill may be considered as evidence of a debt, yet it does not appear that it arose by way of loan. And it is not a promissory note, it contains no words of promise, and is not expressed to be for value received; no action, therefore, can be maintained upon it, without proof of a consideration.

By the Court.—The due bill is an acknowledgment of so much money of the plaintiff's, in the hands of the defendant, for which the defendant is indebted to the plaintiff; and it may well be presumed to be for a loan. It is an acknowledgement under the hand of the defendant, and is sufficient to raise the implied promise in the second count, and might have supported a third count, on an *insimul computassent.*

Verdict for the plaintiff.

See the case Fisher *v.* Leslie, 1 Esp. Cases, 426. A slip of paper, signed by the defendant, in the following letters and words. "I O U eight guineas, was admitted in support of a declaration, containing a count for money lent, and the common counts, by L. KENYON."

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JONES *vs.* B. WEBBER and W. WEBBER.

In an action of ejectment against two, father and son, if it appear that the father had no claim to the premises, but was living with his son on the premises, as a lodger, having no concern with the occupation or management of the farm, he will not be considered as in possession of the premises, but on a disclaimer, will recover his costs against the plaintiff.

A parol agreement cannot be admitted to add to, or vary a written contract.

This was an action of ejectment, for a farm of land in Shrewsbury, containing one hundred and fifty acres.

Benedict Webber disclaimed for the whole, William Webber pleaded the general issue.

The following evidence was produced on the part of the plaintiff. A deed from Benedict Webber, the father, one of the defendants, to William Webber, the son, the other defendant, and a deed from William Webber to the plaintiff; both deeds describing the premises as in the declaration.

It was proved that Benedict Webber, the father from the time he conveyed the farm to his son in May 1789, had lived some times with his son on the premises, and was maintained by him; and some part of the time lived elsewhere, with his other children. That at the time this action was commenced, he was living with his son William Webber, on the premises; that he had no family, and had no concern with the occupation or management of the farm.

The Court held that this was not a sufficient possession in Benedict Webber, who had disclaimed, to entitle the plaintiff to costs against him, but that he should recover his costs against the plaintiff.

It was then stated by *D. Chipman* and *Smith* for the defendant, Benedict Webber, that at the time the deed was given by the defendant to the plaintiff, there was an agreement not reduced to writing, that the deed should be considered as a security for a certain sum of money loaned by the plaintiff to the defendant. The deed was not acknowledged, and if the defendant by a certain day, should procure notes from a certain third person to the plaintiff, for the amount of the sum loaned, the deed was to be delivered up to be cancelled. But if the notes were not procured, the defendant was to acknowledge, the deed, and the plaintiff to execute a bond to the defendant,

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conditioned to re-convey the premises, on the payment of the money so loaned, by a certain day, which day had passed, before the commencement of this action. That the notes not having been procured, the plaintiff had refused to execute the bond as agreed. It was admitted that the money had not been paid by the defendant.

Williams for the plaintiff, objected to this evidence, as it was offered with a view of adding to, and varying a written contract, by parol proof, which would not be permitted at common law; and as a case within the fourth section of the statute regulating conveyances.

By the Court. To admit this evidence would be, not only against an express provision of the statute, but against the known and established rule of evidence, at common law—that parol proof cannot be admitted to add to or vary a written contract. But, had all this been in writing, it would make no defence in the case; it could not effect the plaintiff's right to recover at law. The defendant would not certainly have been in a better situation than a mortgagor, after the day of payment is passed.

Verdict for the plaintiff, against William Webber, and for costs in favor of Benedict Webber, against the plaintiff.

The defendant filed a motion to redeem which was continued by agreement of the parties.

HUBBARD, Appellant *vs.* LEONARD, Appellee.

If either party after judgment, in the County Court, enter a review of the cause to the next term of the County Court, the opposite party may notwithstanding enter an appeal of the same cause to the Supreme Court, and such appeal will be sustained.

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THIS was a motion to dismiss the appeal in this case, as having been irregularly allowed by the County Court.

The ground of the motion was, that the defendant Leonard, after judgment in the County Court of Rutland County in November last, had reviewed the cause to the term of the County Court to be hol-

den in June next; and had regularly entered bail to prosecute the review to effect. After which, and within the time allowed by law; the plaintiff claim'd, and, by the County Court, was admitted to an appeal from the same judgment to the Supreme Court, and entered bail as the law requires, and had brought forward and entered his appeal in this Court.

Mallary, in support of the motion, contended, that the defendant having a legal right, and having been admitted to a review by the County Court; and having entered bail for prosecuting the same, that Court had no authority to grant an appeal to the opposite party, the right had attached in the defendant, being first in diligence, he was first in right.

CHIPMAN, Ch. J. delivered the opinion of the Court.

This point has, in effect, been settled in the case Hastings against Hodges and Parker, at the adjourned term of this Court in this County, in June, 1797, (ante, page 124.) The defendants, Hodges and Parker, had at the March term of the County Court, 1797, entered an appeal from a judgment of the County Court, to the then next stated term of the Supreme Court, to be holden in February, 1798. After the defendants had so entered their appeal, the plaintiff entered an appeal to the adjourned term of the Supreme Court to be holden in June, 1797. At which term the plaintiff Hastings brought forward and entered his appeal. The defendants, moved to dismiss the plaintiff's appeal, as having been irregularly allowed by the County Court, after they, the defendants had entered an appeal to another term. But the Court, on full consideration, sustained the plaintiff's appeal. The Court in that case were of opinion that it was not a case, in which the prior option, and exercise of a right by one party, excluded the right of the other. That both might appeal, or both might review. Both cannot, indeed, bring forward and prosecute the appeal or review. If one first prosecute his appeal or review, the appeal or review by the other party, becomes a nullity, and the bail is discharged. The Court said, in that case, that they should be inclined to favor prompt justice, which would be done by sustaining the plaintiff's appeal.

The law gives to each party a right to review his cause in the County Court, or to appeal to the Supreme Court. And no reason is perceived, for giving the option to the party, who could get the

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first start in a motion for a review, in exclusion of the right of the opposite party to appeal to a superior tribunal. But there are solid reasons, why the right of appeal should have a preference. One party may wish to retain the cause in the inferior Court to a final decision; and, on the construction contended for, he may by entering a review, prevent the cause from being carried to a higher tribunal, except by writ of error, a remedy tedious and expensive, and which, frequently, will not reach the merits of the case. If a review be entered, either for delay or to prevent a decision in a higher tribunal, it is a case not to be favored. The motion must therefore be dismissed, and the appeal sustained.

Langdon and *Strong*, for the appellant.

Mallary, for the appellee.

STATE OF VERMONT *vs.* CAMPBELL.

The Supreme Court have not original jurisdiction of the offence of assault and battery.

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CAMPBELL was indicted at the last term of the Court, for an assault and battery. At this term a motion was filed by the counsel for the respondent, to dismiss the indictment, for that, the Supreme Court have not original jurisdiction of the offence, but appellate jurisdiction only.

The motion was argued by *Williams*, attorney for the State.

By *D. Chipman* and *Langdon*, for the respondent.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. This indictment found against the respondent in this Court, contains three counts. The first, for an assault and battery upon one Luce. The second for an assault and battery upon one Rumsay. The third for tumultuous carriage, and an assault and battery upon the same Rumsay.

This offence comes within the twenty first section of the statute, for the punishment of certain inferior crimes and misdemeanors. The respondent has filed a motion to dismiss the indictment, on

the ground that this Court has not original jurisdiction of the of-fence.

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The general original jurisdiction of the Supreme Court, is limited and defined in the sixth section of the Judiciary act of 1797, in the following words. "And the said Court (the Supreme Court) shall have original and exclusive jurisdiction of all such crimes and misdemeanors as are enumerated and described, in an act entitled an act for the punishment of certain capital and other high crimes, and misdemeanors; and also of all other crimes and misdemeanors, where a fine or penalty shall accrue to the State, or where the punishment extends by law to loss of life or disfranchisement."

"In all cases comprehended in this clause, which marks, generally, the original criminal jurisdiction of the Supreme Court, the jurisdiction of all other Courts is excluded. To this must be referred the clause in the first section of the same act," which Courts (County Courts) within their respective Counties, shall have cognizance of all criminal matters, of every name and nature (except such as are made cognizable before the Supreme Court only, or before justices of the peace.) In the sixth section of this statute before mentioned, there is a further clause, giving to the Supreme Court, appellate jurisdiction from the County Courts of all causes, both civil and criminal, in which by law an appeal is allowed.

In the act defining the powers of justices of the peace, section first, it is enacted, "That every justice of the peace within his respective jurisdiction, be, and he is hereby fully authorized to hear, try and determine all pleas and actions of a criminal nature, if the fines and forfeitures, are within the sum of seven dollars, and the corporal punishment shall not exceed ten stripes." In the fourth section of the same act, appellate jurisdiction is given to the County Courts, in cases appealed from a justice of the peace.

By the sections of these statutes which I have recited, the general original jurisdiction of the several Courts is given, limited and defined; and in these, is discovered no intention to give, in any instance, a concurrent jurisdiction. It has, indeed, been contended, that the second member of the clause before recited, giving original jurisdiction to the Supreme Court, simply gives jurisdiction, but not exclusive. But, certainly such a construction would be a violation of the legitimate principles of the construction of our language. To save repetition, eliptical modes of expression have grown into frequent,

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common, and even universal use. If a preceding sentence, member of a sentence or clause, contains words which qualify the subject; and the following sentence, member or clause, be introduced by the word also, or any like word of reference; this, without repeating the words of qualification, will qualify the sentence, member or clause so introduced, in the same manner, and to the same extent, as the preceding is qualified by the words expressed. Thus, if we say of treason, it is an enormous crime, deserving the severest punishment,so is murder; it is as clearly and strongly asserted of murder, that it is an enormous crime, and deserving of the severest punishment as it is of treason. This principle of construction and its application in the present case are too clear to leave a shadow of doubt. The clause giving original jurisdiction to the Supreme Court, gives it exclusively, in every case to which it is there extended. But, whether in the cases referred to, the Supreme Court has exclusive jurisdiction, or concurrent with the County Courts, it will readily be perceived has no bearing on the present question. The great question is, does the original jurisdiction of the Supreme Court, by a sound construction of the act recited, or of any other act, extend to the offence charged in this indictment?—an offence, not contained in the act for the punishment of certain high crimes and misdemeanors—a case in which the fine or penalty is not appropriated to the State, or to the State's treasury—a case in which the punishment does not extend to the loss of life, limb or disfranchisement, and of which jurisdiction is no where expressly given to this Court.

It has been contended by the Attorney for the State, that all fines and penalties for offences against the State, unless, by law, otherwise appropriated, accrue, of course, and belong to the state; and, consequently, that, in all cases of offences, where the fine or penalty is not otherwise appropriated, the Supreme Court have, within the very words of the act, not only original, but exclusive jurisdiction.

On the part of the respondent, it is contended, that the clause in the act, "where a fine or penalty accrues to the State," embraces those cases, and those only, where a fine or penalty is appropriated and given to the State's treasury, by express provisions of an act of the legislature; and that the County Courts have original exclusive jurisdiction, in all cases where the fine or penalty is not thus appropriated, unless jurisdiction be otherwise expressly given to the Supreme Court, and the Supreme Court have appellate jurisdiction only.

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The Court are of opinion, that the latter is the true construction, that it is the construction made by the legislature, and from which the Court are not at liberty to depart.

It will be recollected, that at the two sessions of the legislature holden in February and October, 1797, a revision of the whole code of Statute law was made, with a view to a general system. The acts already mentioned were then passed, and another act, which makes a part of the system, entitled "an act relating to fines forfeitures, &c." by which it is enacted, section second, "That all fines and penalties imposed on any person or persons, in consequence of any criminal prosecution, or for the breach of any penal law, originally commenced in the Supreme Court of judicature, shall, together with the costs, belong to and be paid into the State's treasury, for the use of the State, &c." Section third, "That all fines and penalties imposed &c. when the prosecution shall be commenced in any County Court, shall belong and be paid, together with costs, to the County treasury of the same County." Section fourth, appropriates the fine or penalty, where the prosecution is originally commenced before a jusitce of the peace, to the treasury of the town, where the offence was committed. With a proviso, that if any such fines penalties and costs, shall be otherwise disposed of by any express law of this State, the same shall be disposed of according to the order of such law.

Now the whole code of revised laws, intended to form a system, are to be construed, by comparing and reconciling one part with another, as though the whole were contained in one act. By an examination and comparison of the several acts, it is clear that the legislature did not intend that a fine or penalty, should, because not otherwise appropriated, be considered as belonging or accruing to the State. And, can a fine or penalty be considered, as so accruing to the State, as to give to the Supreme Court, exclusive jurisdiction, and yet, not so accrue, as to authorize a payment to the use of the State, without an express provision by statute? This cannot be admitted. Besides, if such had been understood or intended by the legislature to be the principle, the provision in the second section of the act relating to fines and penalties, would serve no other purpose than to mislead. The provision in the third section, that in prosecutions commenced before the County Courts, the fine or penalty shall belong to and be paid to the County treasury, would in cases

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of concurrent jurisdiction, have been necessary, for the purpose of diverting the fine or penalty from the State treasury. As in the case of simple larceny, in the first section of the act for the punishment of inferior crimes and misdemeanors. This section, in which the fine is not appropriated, gives to the Supreme Court, and to the County Courts concurrent jurisdiction of the offence. Other instances may be found in the statutes, which it is unnecessary to enumerate.

On the whole, the Court are of opinion, that the principle adopted by the legislature, on this subject is, that fines and penalties shall go to some public use, but the particular use to depend on legislative provision. That the provision in the second section of the act relating to fines and penalties, was not intended to give jurisdiction to the Supreme Court, or in any way to effect it; but presupposes a jurisdiction in the cases therein commenced, either from the clause before cited from the Judiciary act, or from some other act, giving this Court jurisdiction in particular cases.

It is also in this case observable, that the twenty first section of the act for the punishment of certain inferior crimes and misdemeanors, on which the present prosecution is founded, notwithstanding the fine is not limited or appropriated by the act, treats the offence as cognizable, not in the Supreme Court, but in the first instance, and as a matter of course before a justice of the peace; and, in case of aggravation to be sent to the County Court. The last clause in this section is, "and if the offence be aggravated by any highhanded violence, it shall be the duty of the justice of the peace, to bind over the offender to the next County Court, of the same County, in which the offence shall be committed.

The Supreme Court, as well as the County Courts, are in one sense, courts of common law; their proceedings and decisions are according to the course of the common law; but even this is established, or, which is the same thing, adopted, with various modifications, by the constitution and statute laws of the State.

The constitution provides generally, that a Supreme Court shall be established in the State, and County Courts in the several counties, for the administration of justice. But, the extent, the limitation and modification of their several powers, are left as subjects of legislative provision. A brief notice of the several provisions, which the legislature have, from time to time, made on this subject, will

throw additional light on the question before discussed, and lead us to the same conclusion.

The first act establishing a Supreme, or, as it was then called, a Superior Court, was passed in the year 1779, soon after the organization of the Government of Vermont. This act gives jurisdiction in criminal matters to that Court in the following words; "Which Court, (the superior Court) shall have cognizance of all pleas of the State, that relate to life, limb or other corporal punishment; also fines, banishment and divorce; and shall have power to hear and determine the same, by jury or otherwise, according to law, and award execution accordingly." At that time no County Court had been established.

In June, 1782, this act was repealed, and another act passed, which gave jurisdiction to the Supreme Court, in these general terms: "Which Court shall have cognizance of all pleas of the State, criminal actions and causes, and whatsoever relates to the conservation of the peace, and punishment of offenders." This last act, was adopted in the revised code of 1787, without any alteration on this subject. The same act gave jurisdiction to the County Courts, of most crimes short of capital; so far, of course, the jurisdictions were concurrent. On the first day of November, 1791, the legislature repealed this last act, and passed another on the same subject, by which, jurisdiction was given to the Supreme Court, in the same general terms. But in a following section, for the purpose of restraining the jurisdiction of the County Courts, it is further enacted. "That the Supreme Court shall have original exclusive jurisdiction of all such crimes, as are enumerated and described, in an act of this State, entitled an act, against adultery, polygamy and fornication, except fornication. And also, original and exclusive jurisdiction of all crimes, enumerated and contained in an act of this State, entitled an act, for the punishment of divers capital, and other felonies; and also shall have original exclusive jurisdiction of treason, mis-prision of treason, counterfeiting the currency of the State, and every species of forgery, perjury, subornation of perjury, incest, rapes, defaming the civil authority, and all other crimes and misdemeanors, where a fine or penalty is going to the State's treasury; or where the punishment extends by common or statute law to the loss of life, limb or banishment.

Thus the legislature have, at all times, exercised what is, indeed,

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a constitutional right, the power to extend, limit and modify the jurisdiction of the several Courts. The omission, in the present judiciary act, of the clause giving general original jurisdiction, in criminal matters, to the Supreme Court, must, on every rational and legitimate principle of construction, be considered, so far a limitation, so far a restraint of the jurisdiction, which the Supreme Court had exercised under the former acts. The repeal in whole, or in part, of an act giving power, authority or jurisdiction, is, so far, a repeal—a negation of the power, authority or jurisdiction.

The Court, therefore, after a full consideration of the case, are unanimously of opinion, that this Court has not jurisdiction of the offence charged in the indictment; and accordingly the indictment must be dismissed, and the respondent discharged.

YOUNG *vs.* SHAW.

A power to take recognizances, with any legal condition, is incident to every common law court of record. Therefore, although the statute, which authorizes the defendant in certain cases, to file in court, a declaration on book against the plaintiff, provides, that the defendant shall become recognized, &c. Yet, if a third person, in such case, become recognized, instead of the defendant—such recognizance is valid, and a good and legal security to the cognizee.

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THIS was an action of debt on recognizance. The declaration set forth the occasion on which the recognizance was taken, and the condition.—That Guilford D. Young, the present plaintiff, had commenced an action on a note of hand, against Andrew McFarland. On the entry of that action in the County Court, McFarland filed a declaration on book against the plaintiff, Guilford D. Young, under the ninety third section of the judiciary act, and Samuel Shaw the now defendant, became recognized before that Court to Guilford D. Young, for the prosecution of the declaration on book, in favor of McFarland against him, and for costs, in case of failure. In the declaration on book, judgment was rendered in favor of Young, the present plaintiff, for his costs, which remained unpaid.

To this delaration there was a demurrer and joinder.

Williams and *Mallary*, in support of the demurrer, contended

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that the County Court, before whom the recognizance, in this case was taken, had no authority to take a recognizance, of any other person, than of him, who filed the declaration; the recognizance, therefore, having been taken without authority, is void. They recited the words of the act, "at the time of filing such declaration, the defendant or defendants, shall become recognized to the plaintiff, &c." They insisted that the recognizance could not be beld good, under the statute, and that, at common law it could not be valid, as it was taken in a case unknown to the common law—that our courts derive not their power from the common law, but from statute. Common law jurisdiction is given by statute, but no general authority to take recognizances; they have this authority in particular cases only, given by statute. They insisted, therefore, that the recognizance was void, as clearly as it would have been, if taken with a condition different from that prescribed by law.

Langdon, for the plaintiff. The declaration, in this case states that Samuel Shaw the present defendant became recognized, at the special instance and request of McFarland, the then defendant; and *qui facit per alium, facit per se*, is a maxim of law. And many things are good, though not done precisely agreeably to the letter of a statute, if the principal object of the statute be attained. As, where the statute makes it necessary that, on the allowance of a writ of error, a recognizance be taken in double the amount of the debt, yet, if taken for more it is good. So, if an executor enter into a recognizance, though not required by law, so to do, it is good, 2 L. R. 1138, Fanshaw *vs.* Morrison, same 1459, Johnson *vs.* Laserre. These cases shew that courts have a common law power to take recognizances. And, in this case, the condition was for a thing moral and legal—to secure to the plaintiff the costs which he might wrongfully sustain.

The opinion of the Court was delivered by

Chipman, Ch. J. It is not now a question, whether the County Court ought to have received the declaration of McFarland in that case, without his becoming personally recognized to Young, the then plaintiff, nor does it now appear, whether he did personally recognize or not. But the question is, whether the recognizance, taken of the defendant, Shaw, into which he understandingly entered, and which, as to the occasion, purpose and condition is against

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no law, justice or policy, is illegal and void, merely because not specially authorized by statute on that occasion. The statute requires, that the defendant, filing a declaration on book, in such case, shall become recognized to the plaintiff, whose action is to be stayed, to wait the event of such declaration. If he procure another person to be recognized in his stead, or jointly with him, it is not immoral—it is not against any positive law, or against any principle. If it be void, it is because Courts of common law jurisdiction, have no power to take a recognizance in any case, unless specially authorized by statute.

It is said that the courts in this State, do not derive any power from the common law, but all their powers are conferred by statute, and, although they have common law powers, yet those powers are conferred by statute; but this is not precisely so. The establishment of Courts, is provided for by the constitution. They are organized, and their powers, defined, modified, limited or extended by statute, as it was supposed, the nature of the government required, and as would best secure a due and prompt administration of justice.

The provisions of the constitution are very brief, on this subject, and have a constant reference to the common law, without which they would be unintelligible. Had the legislature simply organized the several courts, without any further provision, relating to their powers or mode of proceeding, they would have had, as necessarily incident, all the powers of similar common law courts, not inconsistent with the nature of the government, and the general provisions of the constitution. Where the legislature have by statute, undertaken to declare, ascertain, limit, extend or modify these powers, the statute must govern. In every case of incidental powers, not acted upon by the legislature, the common law, as applicable to the institution of the court, is the only rule and guide. As to this incidental power of taking recognizances, and such power is unquestionably incident, to every common law court of record, the legislature have not in any one instance acted upon it. It has never been thought necessary to declare the power to exist, in any of the courts. There is not a single clause in any of our statutes, on this subject, either enabling or restraining; and that, because the legislature have always understood, as this Court now understand it, that it is a power incident to every common law court of record.

The legislature in many instances, have by law directed, that parties in court, either by themselves or with sureties, in the course of proceedings, civil and criminal, shall become bound, by way of recognizance, either to the opposite party, to the State, or to some public treasury: but in no instance has it been thought necessary, to give a court of record power to take such recognizances: and, clearly because such court was considered as already possessed of the power generally, as necessarily incident to its institution.

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Every recognizance acknowledged in a court of record, with any legal condition whatever, is a good and legal security to the conuzee, whether conditioned for the payment of money, or for the performance of any thing, not contrary to law. On these principles, this recognizance must be considered as a good and legal security. Had it been a bond of indemnity, executed by the defendant, Shaw, to the plaintiff, with the same condition, which is expressed in this recognizance, no one would presume to question its legality and bringing force. The only difference between the two sureties is, that this is a security authenticated with greater solemnity. There must, therefore, be

Judgment for the plaintiff.

Brown *vs.* Bebee.

An action cannot be maintained on a note of hand, which is in the following words: For value received, I promise to pay J. B. sixteen the first day of May next, with interest. Parol proof not being admissible, to explain such patent ambiguity; but the payee must resort to the original contract—treating the note as a nullity.

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THE plaintiff in error, who was also plaintiff below, had commenced an action before a justice of the peace, on a promissory note, which was carried to the County Court by appeal; in which court the plaintiff declared on a promissory note of the following tenor:

Sixteenth of March, 1812. For value received, I promise to pay Jonathan Brown sixteen, on the first day of May next, with interest.

(Signed) AARON BEBEE.

The plaintiff in his declaration, averred that the word *sixteen*, in the note, meant sixteen dollars.

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On trial of the action, upon the general issue, the County Court refused to admit parol evidence, to explain the note, and shew that by the word sixteen, the parties meant sixteen dollars; to which decision of the Court, the plaintiff's council excepted, and filed a bill of exception, on which this writ of error was brought. The error assigned, is, the rejection by the County Court, of parol evidence to explain the note.

Plea—*that there is no error.*

Strong and *Mallary*, for the plaintiff in error. Parol evidence ought to have been admitted to explain the note. The word sixteen, had, in the minds of the parties, some meaning; it had reference to something.—"The sum of sixteen," must have been intended money—they could mean nothing else, as the sum was payable with interest. Under such circumstances, the law will permit explanation by parol proof; and the defendant will not be permitted, by such a mere slip in drawing the note, to evade the payment of a debt, which he honestly owes, and is bound in conscience to pay.

Langdon, for the defendant. What the parties intended by inserting in the note, the words "sixteen," is as uncertain as any thing can be. They might have intended, dollars, cents, pounds, shillings, pence, or any number of any thing; for it may be made to mean any and every thing, which passes by number. It is a patent ambiguity, which appears on the face of the instrument; and parol evidence cannot be admitted to explain it. Peak's Ev. 82.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. the rule certainly is, as laid down by the defendant's counsel, that parol proof cannot be admitted to explain, extend or vary a written contract. There is but one exception, if it may be called an exception, that is, in the case of a latent ambiguity. As in the case usually put, of a devise to A.—there are two persons by the name of A. father and son: this, appearing by parol proof, introduces an ambiguity, as to the person intended by the testator. But as the ambiguity is not apparent on the face of the devise, it is called a latent ambiguity, and as it is raised by parol, it may be explained by parol. But where there is a devise

of $50,00 wholly omitting to name any devise ; this is a patent ambiguity, which cannot be explained by parol.

But it is said, that this is a mistake, and that mistakes are allowed to be rectified. There are cases in which a court of Chancery will correct a mistake, or rather, compel the party to correct it, by supplying what was omitted by mistake ; but this does not belong to a court of law.

But, in simple contracts, a party is rarely without remedy in a court of law. As in the present case, the note through an omission being void or ineffectual, the plaintiff may resort to the original contract. He may sue on the original cause of action, and recover the demand, for which the note was intended to be given. Had the plaintiff, in this case, added a count applicable to the original contract, he might have recovered what was his just due ; he still may have that remedy.

But in this action, brought on the note, the County Court were right in rejecting parol evidence, to prove what the note should have been, or how it should have been written ; the decision is supported equally by precedent, and the soundest principles. In an action on a note, the plaintiff is entitled to recover, by proving only the execution of the note ; from the solemnity and certainty of the instrument, it affords evidence of the contract, the consideration, and of every thing which is necessary to entitle the plaintiff to recover. To give this effect to a note, and yet allow the plaintiff to supply any defect in the note, by parol testimony, or in other words, to prove what the note should have been, as agreed between the parties, by parol, is perfectly inconsistent—it would be to give the plaintiff all the benefit of a written contract, and yet permit him to prove the contract by parol testimony.

The judgment of the County Court must therefore, be affirmed.

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February.
1814.

HIDE *vs.* CHILDS, and others, in Error.

In an action on an indemnifying bond, given to a Sheriff, by his deputy, in assigning breaches of the condition, it is necessary to aver, that the deputy had been negligent in the performance of some official duty, that in consequence of such negligence, the Sheriff had become liable, and that the creditor, or person injured by such negligence, had commenced an action against the Sheriff, and had recovered a certain sum, for his damage and costs, for such neglect of the deputy.

THE original action was commenced on a bond given to Aruna W. Hide, late Sheriff of Rutland County, by Rodolphus R. Childs, Penuel Childs, and three others. On oyer the condition of the bond was set forth as follows: "Now, the condition of the above obligation is such, that if the above named Rodolphus R. Childs, shall well and truly and faithfully perform and execute the office of deputy Sheriff, under the said Aruna W. Hide, Sheriff as aforesaid, within and for the County of Rutland, aforesaid, from this date, until the third day of December, 1809, (the bond bearing date the 30th day of November, 1808,) and in all things, and in all matters, relative to said office of deputy Sheriff, indemnify and save harmless the said Aruna W. Hide, as Sheriff as aforesaid, his heirs, executors, and administrators from all costs and damage, which he, the said Sheriff may suffer; by reason of any default or neglect of the said Rodolphus R. Childs, as deputy Sheriff, as aforesaid, then this obligation to be void.

The defendants pleaded, generally *non damnificatus*.

To which the plaintiff replied, that the said R. R. Childs, did not well and faithfully execute the office of deputy Sheriff, agreeably to the condition of said bond, and, for breaches therein, the plaintiff assigned the following. That the said R. R. Childs, as deputy Sheriff, as aforesaid, received of the said Aruna W. Hide, an execution in favor of John Doolittle against Penuel Childs, of Brandon, in said county of Rutland, on the 20th day of November, 1809, signed by Martin Post, clerk of Addison County Court, which execution, the said R. R. Childs, hath never accounted for, and hath paid only the sum of $97 in part satisfaction of said execution. And that the said Aruna W. Hide, as Sheriff as aforesaid, hath been sued for the neglect of the said R. R. Childs, in not returning, col-

lecting and paying over said execution, at the County Court holden at Rutland, in and for the county of Rutland, on the third Monday of November, 1810, and a judgment in said suit had against him for the sum of $40,99 cents damages, and for the sum of $11,89 cents costs of suit, and execution was taken out on said judgment, and a *non est* return thereon. And the bail of the said Aruna W. Hide hath been sued therefor, and a judgment at the November term of Rutland County Court, 1811, recovered against said bail, for the sum of $53,13 cents damages, and for the sum of $15,92 cents, costs of the suit. Whereby the condition of said bond hath been broken and forfeited, and this he is ready to verify, &c.

To this replication, there was in the Court below, a general demurrer and joinder; and the Court rendered judgment for the plaintiff below. To reverse which judgment, the defendant below brought this writ of error, and assigned the general error. Plea—that there is no error.

Newel and *Page*, for the plaintiff in error. The plaintiff's replication in this case is clearly bad. Where the defendant, pleads performance of the condition generally, the plaintiff must assign a breach, as particularly as in a declaration. The plaintiff below, ought, in his replication to have set forth the court, in which the judgment was rendered, on which the execution was issued, which was delivered to R. R. Childs, to collect; and also, to have set forth the judgment. Although this be matter of inducement only, yet it ought to have been set forth, to induce the principal fact. In Turner *v.* Eyers, 3 Bos. and Pul. p. 456, it is laid down, that, in an action for an escape, any matter of inducement, which must be proved, must be properly set forth, 1 Chit. 492. The counsel also insisted that an officer is not liable, for not paying over money collected on an execution, until demand made, of the money, and it does not appear from the replication that the money was ever demanded of Childs, the deputy.

Langdon, for the defendant in error. I have not myself, had an opportunity to examine authorities in this case, and certainly those which have been cited by the plaintiff's counsel, have no application to the case before the Court; but it cannot be necessary to be particular in the assignment of breaches in such case, it can be of no use to the defendant. Surely it cannot be necessary to set forth

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Hide *vs.* Childs, et al.

the judgment, on which the execution issued, that was delivered to Childs, the deputy.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. The replication in this case is not drawn with any technical accuracy, either as to the matter or form; still if we can find a breach sufficiently alledged, without admitting too great a latitude of intendment, the judgment of the County Court ought to be supported; but, on examination, we are sorry to find that this is impossible.

Some of the exceptions, however, which have been taken by the plaintiff, in error, are not well founded. It was not necessary, in assigning the breach, in this case, to set forth that a demand had been made, by the creditor on the deputy Sheriff, to pay over the money, however necessary that might be in a suit in favor of the creditor against the officer. It was also unnecessary to set out the judgment, on which the execution issued. The action was not on the judgment.—The plaintiff below, was not privy to the judgment, and the defendant below would not have been entitled to oyer. But it was necessary to set forth that the execution was issued on a judgment of some court: in this case, it is supposed to have been a judgment of Addison County Court, this is intimated by the manner in which the execution is set out. It should also have been averred, that the execution was delivered to the Sheriff, by the creditor, to collect, otherwise it cannot appear that the Sheriff had any official concern with it. The replication should also have set forth, when the execution was returnable, and, in strictness, that it was delivered to the defendant, (or, as it is that he received it) to serve, execute, collect and return according to law. There is nothing of all this in the replication. It is not averred, that the deputy neglected to levy, collect or return the execution. But, it is, in some sort averred, that the deputy did not pay over the whole amount of the execution, by an averment, that "the said R. R. Childs, hath never accounted for said execution, and hath paid only ninety seven dollars in part satisfaction thereof." It ought to have been directly averred, that the deputy neglected to serve, collect or return said execution according to law; or that he had levied and collected the amount of said execution, and had neglected to pay over the same; that, by reason of such neglect, the Sheriff became liable; of all

which there is not a word in the replication. The replication ought then to have set forth, that, in consequence of such neglect of the deputy, the creditor commenced an action against the Sheriff, at a court, &c. In which action such proceedings were had, and suffered, that, at such a term of said Court, judgment was rendered in such action against the Sheriff for such a sum, and thence to deduce, that the Sheriff was damnified. Instead of which, there is introduced into the replication, the following brief statement. "And the said Aruna W. Hide as aforesaid, hath been sued for the neglect of the said R. R. Childs, in not returning, collecting and paying over said execution, at the County Court holden at Rutland, within and for the county of Rutland, on the third Monday of November, 1810, and a judgment in said suit had against him, for the sum of $40,99 cents damages, and for the sum of $11,95 cents costs of suit. We may, indeed, collect, from this loose sketch, that the suit here mentioned, was in favor of the creditor, for we cannot suppose, that any other person could have been advised to bring an action for that cause, but, this is too loose in a plea. What follows, of a *non est* of the execution, on that judgment—of a suit and judgment against the Sheriff's bail, is surplussage at least.

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On the whole the Court, find it impossible to support the judgment of the County Court, it must therefore be reversed.

JUDGE OF PROBATE *vs.* PRATT.

James Harrington, and Robert Anderson, Administrators, de bonis non, of Aaron Read deceased, prosecutors.

In an action on an administration bond, given by Aaron Thrall, administrator of Aaron Read, deceased, by the administrators, *de bonis non*, of said Aaron Read, prosecutors, it was adjudged no breach of any condition of such bond, that, by a reference, made under an order of the judge of probate, by the consent of parties, that is of the said administrators, *de bonis non*, of Aaron Read; and of the administrators of the said Aaron Thrall, deceased, a certain sum was awarded in favor of the said administrators, *de bonis non*, of Aaron Read, against the administrator of said Aaron Thrall, as the amount of the estate of the said Aaron Read, remaining in the hands of the said Aaron Thrall, at the time of his decease, and that, that sum had not been paid.

The condition in an administrator's bond to the judge of probate, that the administrator shall make, or cause to be made, a true and just account of his administration, is not broken by a neglect in the administrator to pay the debts and make a distribution of the estate of the deceased.

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ON oyer of the probate bond, on which this action was brought,

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with the condition thereto annexed, the defendant pleaded performance of the conditions, by Aaron Thrall the principal. The prosecutors replied, assigning two breaches of the condition; the defendant rejoined, and to the rejoinder there was a demurrer and joinder.

Langdon and *Mallary*, for the plaintiff.

Williams and *D. Smith*, for the defendant.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. This is an action on a bond, executed by Aaron Thrall and Elizabeth Read, as principal, and Ebenezer Pratt, the defendant, as surety, to Elisha Clarke, judge of Probate for the district of Rutland, and his successors in office, on granting letters of administration to the said Aaron Thrall, on the estate of Aaron Read, then late of Rutland, deceased. The bond bears date the first day of September, 1796, and in the penal sum of £300, with the usual condition as the law directs. Elizabeth Read, soon after the administration was granted, married to one Whipple, and removed from the State, and Aaron Thrall became the sole administrator of the estate. Before the commencement of this action, Aaron Thrall deceased, and ——— were appointed administrators of his estate, and the prosecutors took out letters of administration *de bonis non* of the estate of Aaron Read.

The defendants have prayed oyer of the bond, and condition, which are set forth on the record. I will repeat the condition at large, to give a more distinct view of the points to be decided.

" That if the above bounden Elizabeth Read, and Aaron Thrall, administrators of all and singular, the goods, chattels, and estate of Aaron Read, late of Rutland, deceased, do make, or cause to be made a true and perfect inventory of all the goods, chattles, credits and estate of the said deceased, which have or shall come to the hands, possession, or knowledge of the said Elizabeth Read and Aaron Thrall, or into the hands, possession or knowledge of any person or persons, for them, and, the same so made, do exhibit into the registry of said court of probate, for said district of Rutland, at or before the twentieth day of October next, ensuing, (1796) and the same goods, chattels, credits and estate, and all other the goods, chattels, credits and estate of the said deceased, at the time of his

decease, which shall, at any time after, come into the hands of the said administrators, or into the hands or possession of any other person or persons, for them, do well and truly administer according to law. And further, do make or cause to be made a true and just account of the said administration, at or before the first day of September, 1797. And all the rest and residue of said goods and chattles, credits and estate which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the said court of Probate, shall deliver and pay unto such person or persons respectively, as the said court of probate, shall, by their decree or sentence, according to the true intent and meaning of the law, appoint." [The remaining part of the condition has no bearing on the points to be decided, in this case, and therefore omitted.]

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The defendant having pleaded performance of the condition, the prosecutors, in their replication, have assigned the following breaches of the condition.

1. "That the said Aaron Thrall, administrator of the said Aaron Reed, did not in his life time, make, or cause to be made a true account of his administration of the goods, chattels, rights and credits of the said Aaron Read, deceased, to the said Court of Probate, on or before the first day of September, 1707, according to tenor and effect of the condition of said bond, although often thereto requested and demanded, but the said Aaron Thrall, in his lifetime, and his heirs and administrators, since his descease, have ever refused, and still do refuse to account, either to the judge of probate, or to the prosecutors,as administrators as aforesaid, for the sum of 5,380 dollars of the estate of the said Aaron Read, which was in the hands of the said Aaron Thrall, in his life time, and came into the hands of his administrators after his decease.

2. "That the sum of $3,359,61 cents, had been by, or under an order of reference, made by the judge of Probate, with the consent of parties, awarded to the prosecutors, as administrators *de bonis non*, of the said Aaron Read, deceased, being the amount of the estate of the said Aaron Read, in the hands of the said Aaron Thrall, at the time of his decease; and assigning as a breach, that neither the said Aaron Thrall in his life time, or his administrators since his decease, had paid over the same, to the prosecutors, administrators as aforesaid, nor had they, or either of them, accounted with the judge of probate for the same."

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The defendant has rejoined, as to the first breach assigned, that the said Aaron Thrall, as administrator of the said Aaron Read, did in his life time, make a true and just account of his said administration of the goods, chattels, credits and estate of the said Aaron Read, to the said Court of Probate, before the said first day of September, 1797; to wit, on the 24th day of February, 1797, which account was received and allowed by the said Court of Probate, on the said 24th day of February, 1797, as appears by the records thereof, remaining in the said Court of Probate. The answer to the second breach assigned is not material.

The prosecutors having by oyer, spread upon the record, the proceedings and record of the court of Probate, in the defendant's rejoinder mentioned, demurred to the plea.

After stripping the case of the mass of vorbage, in which it is involved on the record, the whole is solved by an answer to two questions.

1. Have the prosecutors assigned any breach of the condition of the bond affecting their interest, as administrators *de bonis non* of Aaron Read?

2. If such breach be assigned, has the defendant given a sufficient answer to it?

The first breach assigned, is that the principal, Aaron Thrall did not make, or cause to be made, a true and just account of his administration, on or before the said first day of September, 1797, according to the tenor and effect of said condition. This is, in substance a good assignment of a breach of one of the conditions of the bond. How far it is a breach, affecting the interest of the prosecutors, the Court do not think it material to inquire; because the defendant in his rejoinder, has answered it, by setting forth a full and complete performance, by his principal, Aaron Thrall: and the prosecutors not content with this, have, by praying oyer of the Probate records, placed on this record, full evidence, of such performance.

It has been urged, indeed, that the condition enjoining a true account to be made by the time limited, comprehends the whole administration, even to the final distribution, but this is not so. The distribution is necessarily subsequent to the making of the account, which must first be done, in order to ascertain the fund of which distribution is to be made, and it is enforced by a distinct condition following in its natural order.

Rutland, February. 1814.

Judge of Probate *vs.* Pratt.

The second assignment of a breach, does not set forth a breach of any condition to be found in the bond—there is nothing to which the supposed breach can apply. But were there any condition, to which it might be applied, there is an absurdity in the manner of assigning it. It is assigned as a breach of some supposed condition, that Aaron Thrall did not, in his life time pay, and that his administrators have not paid a certain sum awarded since his death. It supposes that a duty may as well pass from an administrator to his intestate, as from the intestate to his administrator. The Court are for these reasons unanimously of opinion, that there must be

Judgment for the defendant.

DUPY, *qui tam vs.* WICKWIRE.

An act of the legislature directing a deposition to be read in the trial of a cause, is an interference with the Judiciary department, is retrospective in its operation, a legislative sentence rather than a law, and void; being against the constitution of this State, and the constitution of the United States.

A deposition taken to be used in a *qui tam* action is admissible, and may be read in evidence, although, in the caption the prosecutor be stated as the sole plaintiff, omitting the *qui tam*.

Bennington February. 1814.

THIS was an action of debt for three hundred dollars, brought on the eleventh section of the act providing for the support of the poor, in which the plaintiff, who sues, as well in his own behalf, as in behalf of the town of Readsborough, declares, that the defendant did, on the 15th day of June, 1810, transport into the town of Readsborough, one Jacob Morse, a poor person, not having a legal settlement in said town, with an intent to make the said town of Readsborough, chargeable with the maintenance of the said Jacob Morse.

Wright, for the plaintiff, on trial, offered the deposition of Jacob Morse, the pauper. In the caption of the deposition, the cause in which it was to be used, was entitled an action, in which Joshua Dupy is plaintiff, and Reuben Wickwire is defendant, omitting the *qui tam*. Morse the pauper had died, pending the action; and the deposition having been rejected, on the trial of the action in the County Court, the plaintiff had procured an act of the legislature,

Bennington February. 1814.

directing the deposition to be read in any future trial, of the action, notwithstanding, the irregularity in the caption.

Dupy vs Wickwire.

Fay, for the defendant, objected to the admission of the deposition. It is not taken to be used in this cause; the omission of *qui tam* is fatal. Joshua Dupy *qui tam v.* Reuben Wickwire, is an action totally different, from an action, Joshua Dupy *v.* Reuben Wickwire.

Wright, for the plaintiff contended, that the omission of *qui tam* did not vary the title of the action. Such action is considered as in substance, an action in favor of the prosecutor, and he is treated as the sole plaidtiff, 2 Hawdins, 379. But, as the Court below, had rejected the deposition, the plaintiff had procured an act of the legislature to be passed, directidg the deposition to be read, and he produced a copy of the act.

By the Court. If the plaintiff be entitled to read the deposition in this case, he is not entitled to read it by virtue of the act of the legislature. The act is most clearly unconstitutional and void. It is an attempt of the legislature to make a judicial decision in a particular case; but the constitution of this State, prohibits the legislature from the exercise of any judicial powers. The act is also retrospective in its operation, is rather in the nature of a legislative sentence, order or decree, than of a law. Besides, if the deposition was not legally taken in this case, it is a mere voluntary affidavit. And, the person making such a voluntary affidavit, does not subject himself to the pains and penalties of perjury, for any false swearing in such affidavit; it is not taken, therefore, under that security to which the person, against whom it is to be read, is entitled; nor, can any *ex pos facto* law give that security. Suppose this deposition to have been false, in some material fact, and that Morse were not dead, but gone to some parts unknown, and, by virtue of this act his deposition read, and a verdict obtained against the defendant, and Morse should return; could he be convicted of perjury, for swearing falsely in giving the deposition? Certainly not. Even if the legislature should have specially provided, that the deponent, should be liable to all the pains and penalties of wilful and corrupt perjury, for false swearing; such *ex pos facto* provision would have been void, as being against the constitution of this State, the constitution of the United States, and even against the laws of na-

ture. The deposition, therefore cannot be admitted on the authority of the act of the legislature.

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Dupy *vs.* Wickwire.

But, the Court on consideration are of opinion that the deposition is legally taken. It seems to have been settled that the person suing in such case may bring the action in his own name only. In England, the writ may be brought *qui tam*, and the declaration be in the name of the person prosecuting only—and, that there is no necessity that the writ or declaration should express the *qui tam*. The person prosecuting may well be considered as the sole plaintiff. The title of the action given in the caption of the deposition is sufficiently correct.

Let the deposition be read.

Mead Administrator of Lee *vs.* Mallet and Swift.

If a collector of land tax, omit to lodge in the town clerks office, or other proper office, an account of his proceedings, within thirty days from the close of his vendue, for the sale of lands, his sales are void, and no title is acquired under such vendue.

Binnington February. 1814.

THIS was an action of ejectment for a farm of land in Manchester. On trial to the jury upon the general issue, the plaintiff made out an apparent good title on record, and proved that he died, seized of the premises demanded.

The defendants then set up a title in one of the defendants, (the other being a tenant) by virtue of a vendue sale of the premises, by Bull, constable of the town of Manchester, and collector of a land tax of one cent on the acre, granted by the legislature in October, 1797.

The act granting the tax was read, and the defendants offered in evidence, a copy of the record of the proceedings of the collector in the vendue, certified by the town Clerk of Manchester. It appeared by the copy of the record, that the proceedings of the collector were regular, and that his vendue for the sale of lands, was closed on the thirty first day of July, 1799; and that a copy of his proceedings were lodged in the town Clerk's office, on the fourth day of March, 1800.

Bennington February. 1814.

Mead *vs.* Mallet and Swift.

Sperry, for the plaintiff, objected to the evidence. It appears by the copy of the record from the office of the town Clerk, that the collector completed his sale of lands on the thirty first day of July, 1799, and that he did not lodge in the office of the town Clerk, a copy of his proceedings until the fourth day of March, 1800, more than six months after the close of his vendue. By an act of the legislature passed the 5th day of November, 1799, entitled an act, directing collectors of land taxes in their office and duty, it is enacted, "that every collector of land taxes shall, within thirty days after completing the sale of any township, cause his proceedings to be recorded in the proper office, for the recording of deeds." As the collector has failed of complying with this plain requisition of the statute, his sales are void. The principle, so well settled, that no person can be divested of his property, without his own consent, by the mere operation of law, unless the law be strictly pursued, is obviously applicable to this case.

Langdon, for the defendants, contended that the act, requiring the collector to lodge in the office of the town Clerk, a copy of his proceedings, within thirty days, after completing his sales, is merely directory, and was not intended to affect sales which had been regularly made.

By the Court. Whatever might be considered as the true construction of the act, were it *res integra*, it must now be considered, that, if a collector of a land tax, neglect to lodge in the proper office, an account of his proceedings, within thirty days from the close of his vendue, agreeably to the provisions of the act, his sales are void. Such has been the uniform construction of the act, ever since it was passed. On the faith of this construction, numerous estates in land have been bought and sold, and are now holden, and, it would be productive of great injustice now to disturb it.

Verdict for the plaintiff.

Bennington
July.
1814.

VICKERY *vs* TAFT.

If A, draw logs to the saw mill of B, to be sawed on shares, and B, saw them and sell the whole of the boards, he is guilty of a *tort*, and an action of trover will lie in favor of A, against B, for his share of the boards.

THIS was an action of trover for a quantity of boards. On trial at the last term, it appeared that Vickery had drawn a quantity of logs to Taft's saw mill, which Taft agreed to saw into boards, and either receive pay for sawing them, or to saw them for the customary share—one half of the boards.—That Taft had sawed the logs, and sold the whole of the boards, and received the pay for them.

The defendant's counsel, insisted that the action of trover would not lie in this case; for that, Vickery and Taft were tenants in common of the boards—that each had a right to sell the whole, and was liable only to account with the other for his share.

The Court overruled the objection, but, at the instance of the defendant's counsel, reserved the question, and a verdict was taken for the plaintiff. A motion for a *non suit* was now made on the case reserved.

Young, for the defendant, contended, that the plaintiff and defendant were tenants in common of the boards, when sawed; and one tenant in common of a chattel can make a valid sale, which could not be were the sale a tort. If such sale be a tort, the other tenant in comman, may maintain an action of trover; not only against the seller, but against the purchaser, which is not the case. Each has a right to sell, as is every day's practice in partnership concerns; Bul. N. 34, and in the case of joint owners of a ship, 2 Esp. Dig. 586.

Langdon, for the plaintiff, insisted that the plaintiff and defendant, were not joint owners of the boards. If Taft was to be paid for sawing, he might have a lien on the boards for his pay, if he was to have one half for sawing, he could have no right to sell the other half. If one tenant in common of a chattel, sell or destroy it, trover lies, Bul. N. 34. Trover will not lie against the purchaser, but it will lie against the seller, for the property of the other part owner.

The opinion of the Court was delivered by

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Vickery vs. Taft.

CHIPMAN, C. J. Where goods in partnership are intended for sale, in which consists the profits of the concern, a sale by one partner is, not only, as it relates to the purchaser, but as it relates to the partners between themselves, the joint act of all the partners. To consider such act of the seller of partnership property, as a tort, would be to embarrass, if not defeat the very intention of the partnership—profit by sale. The other partners have a right to their share of the price only.

Where personal property is kept by partners for profit in the use only, as in the case of tools, implements and machinery, in carrying on a Manufactory in partnership, the sale of such tools, implements, or machinery, by one partner, may, by the other partners be treated as a tort, if made without their consent or approbation, although the sale may be considered as good to the purchaser against all.

The present, however is a case different from either of the above cases. In this case, the defendant cannot be considered as a partner, or, in any sense, a joint owner of the property. From the evidence in this case, it appears that the plaintiff had his option, either to pay the defendant for sawing the logs into boards, or permit him to take one half the boards—the customary share for sawing. After the sawing, the defendant had, at most, only a lien on the boards for the price of sawing, or for the usual share of the boards. It seems that the plaintiff had not made his option, nor had he been called upon, to make his option, whether he would pay for sawing or give the defendant one half of the boards. As the property was divisible, without loss or injury, the defendant might have made a fair division, and sold his half of the boards as his own. But, instead of this, he sold the whole of the boards as his own; in this he was guilty of a tort, and the action of trover well lies.

In assessing damages, the jury deducted the price of sawing from the value of the boards. This is the justice of the case.

The verdict must stand.

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POTTER *vs.* STANLEY, in error.

To an action on a promissory note, a plea in bar, that the note was given without consideration is insufficient—as it amounts to the general issue.

HENRY STANLEY brought his action in the County Court, against Amos Potter, 2d on a promissory note, to which the defendant put in the following plea in bar. "And now the said Amos Potter, 2d by his attornies, Young and Robinson, pleads and says, that the said Henry ought not to have and maintain his said action thereof against him the said Amos, because he says there was no consideration had and received of the said Henry, by the said Amos, for which the said note, declared upon by the said Henry, was given; but that the money received for which said note was given, was received of Mrs. Potter, wife of Amos Potter, and is the property of the said Amos Potter, and this he is ready to verify, &c. To which plea the plaintiff below demurred. And the County Court rendered judgment for the plaintiff on the insufficiency of the plea in bar. To reverse that judgment, Amos Potter, 2d the defendant below, brought this writ of error. Several errors were assigned, but the only question made upon the argument, was on the sufficiency of the plea.

Young and *Robinson*, for the plaintiff in error.

Wright, for the defendant.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. The plea in bar in this case, if it amount to any thing, amounts to the general issue. The consideration is, if I may use the expression, of the very essence of a promise. It is true that a general averment in a note and declaration, is, *prima facie*, sufficient for the plaintiff, and puts the defendant, to prove that the note was obtained by fraud, imposition, or on an illegal consideration, or on a consideration which has failed. If the defendant can shew this, the law says that he did not assume and promise. It goes to the original cause and ground of the action. But, to permit the defendant, in the case of a promissory note, by a mere averment of a want of consideration, to put the plaintiff upon the proof of a special consideration, when a general consideration is acknowledged in the execution of the contract, would be to unsettle both prin-

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Potter *vs.* Stanley.

ciples and practice; it would be to reduce these iustruments, back to parol contracts, and would in many instances, particularly, in the hands of an indorsee render them equally, if not more inconvenient than parol agreements.

It is true that some matters, which may be given in evidence under the general issue in *assumpsit*, may also be pleaded in bar, as payment, accord and satisfaction, and a release; because the plea in such case allows the cause of action once to have subsisted; but, nothing can, in *assumpsit*, be pleaded in bar, which goes to deny the original cause of action.

It seems here, indeed, that the pleader intended to go further, than a naked averment of a want of consideration, and to set forth some facts from which to infer a want of consideration. But whatever his intention might have been, he has been so loose and vague in his expressions, as not to be fairly intelligiable. He says the money received, for which the note was given, was received of Mrs. Potter, wife of Amos Potter, and was the property of Amos Potter. Is the Amos Potter mentioned in this part of the plea, the same Amos Potter, who was impleaded by the name of Amos Potter, 2d? for this addition to which he has answered, supposes another Amos Potter, of the same name without the addition. This is too vague and uncertain. And the Court consider the plea as insufficient in every point of view and therefore

Affirm the judgment of the County Court.

READ *vs.* YOUNG, in error.

Specialties are not negotiable, and no action can be maintained on an instrument under seal, in the name of the assignee.

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SAMUEL B. YOUNG, the defendant in error, brought an action of covenant against David Read, the plaintiff in error, before the County Court for the County of Bennington, in which he declared against the said Read, "That on the first day of June, 1811, the said David Read, did, by his deed, of that date, signed with his hand and sealed with his seal, covenant to pay to T. Everet, or bearer, 429,79 six months after date," making a profert of the in-

strument, and setting forth an endorsement by T. Everet, directing the contents to be paid to Samuel B. Young, the plaintiff below; from these facts raises a liability and promise by David Read, to pay to the said Samuel B. Young, avers that the said David Read had never paid, and concludes, "and so the said David Read, his covenant aforesaid hath not kept, but hath broken the same." The deed, on oyer, was set forth in the words and figures following:—

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Bennington, June 1, 1811. Six months after date I promise to pay to Thomas Everet or bearer, four hundred twenty nine dollars, value received. DAVID READ. (L.S.)

On the back of which was the following endorsement.

Bennington, June 1, 1811. Value received, pay the contents to Samuel B. Young, or bearer. THOMAS EVERET.

To which declaration, David Read, the defendant, below, put in a general demurrer; and the Court below, rendered judgment for the plaintiff. To reverse which judgment Read, the defendant below, brought this writ of error, and assigned the general error; to which the defendant in error pleaded, in *nullo est erratum*.

Wright, for the plaintiff in error. The original action in this case was an attempt to render specialties negotiable, like promissory notes, and bills of exchange. But no instrument under seal is negotiable, either at common law, or by statute, so as to enable the indorsee to maintain an action upon it, in his own name. For this reason the judgment is erroneous and ought to be reversed.

But, in this case, covenant and *assumpsit* are joined in the same declaration. It must be unnecessary to advert to authorities to prove that, a count in covenant, and a count in *assumpsit* cannot be joined in the same declaration: it is to be presumed, that the attorney who drew this declaration, was aware of this principle of law, and that it is as old as the law itself, but considered that the system of law would be vastly improved by setting it aside. But, his fertile genius did not suffer him to stop here, he has attempted a still further improvement, by joining covenant and *assumpsit* in the same count.

Young, for himself. There can be no good reason why an indorsee of a specialty, or instrument under seal, may not maintain an

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Read vs. Young.

action, in his own name, on such instrument, as well as the indorsee of a promissory note or bill of exchange. The liability is raised on the endorsement, and the *assumpsit* alledged to pay to the plaintiff below, as the indorsee or bearer, in order to lay a foundation for a breach of the covenant. David Read had covenanted to pay to Thomas Everet or bearer, and his refusal to pay to the endorsee or bearer, is clearly a breach of the covenant.

By the Court. It is believed, that this is the first attempt ever made by any one, to support an action on a speciality in the name of the assignee of such specialty. To allow this, would be to expunge from the law, the maxim, that a chose in action is not transferable. Whether there is the same reason for rendering instruments under seal negotiable, as there is for rendering promissory notes and bills of exchange negotiable, is a question for the legislature to decide, not for courts of law. Certain *bona fide* assignments of specialties, and on certain considerations, will, indeed, afford the assignee a remedy in a Court of Equity, and, in some cases, will be protected in a Court of law; but an assignment, in such case, will not vest in the assignee, a right of maintaining an action in his own name on the specialty assigned.

The attorney who drew the declaration in this case, must have felt how impossible it was to state his case, in consistency with the settled rules and maxims of law. He found it impossible to avoid a heterogenous mixture of covenant and *assumpsit*—of specialty and simple contract. For the original contract, in this case is a speciality, while the assignment, or rather endorsement is without seal, a mere simple contract.

To sustain this action would be to remove the ancient land marks of the law in pleadings, and remove the ancient and long established boundaries of actions. The judgment of the Court below must, therefore, be reversed.

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BENHAM *vs.* SAGE and others, in error.

In every case coming within the seventy fifth section of the judiciary act, where the sum, for which judgment ought to be rendered, is uncertain, either party has a right to have the damages assessed by a jury; and if a motion be made by either party to have the damages so assessed, by a jury, and the application be refused, and the motion dismissed by the Court, it is error, and the judgment rendered in the case, will be reversed.

MOSES BENHAM, on the twenty second day of March, 1811, recovered judgment, before a justice of the peace for the County of Bennington, against Moses Sage, for the sum of $45,51 cents, damages, and for the sum of $1,60 cents, costs of suit. Moses Sage moved for, and was admitted to an appeal from that judgment, to the County Court, then next to be holden for said County in December, 1811; and thereupon Moses Sage, J. Sage and Moses Sage, jun. entered into a recognizance to Moses Benham, the plaintiff, in the penal sum of $70, conditioned that Moses Sage should prosecute his said appeal to effect, and answer and pay all intervening damages and costs in case of failure. Moses Sage entered his appeal in said County Court, and such proceedings were had therein, that, at the term of said Court, holden in June, 1811, said Benham recovered judgment against the said Moses Sage, for the sum of $49,51 cents damages, and for the sum of $6,61 cents, costs of suit. Benham prayed out a writ of execution on the judgment, and Moses Sage was, by virtue thereof, committed to prison. And Benham brought an action on said recognizance, at the term of said County Court, holden in December, 1811, against the said Moses Sage, J. Sage and Moses Sage, jun. And, in his declaration set forth the recognizance and the condition; and assigned, among other things, as a breach of the condition, that the said Moses Sage had not prosecuted his said appeal to effect, nor paid the damages and costs in that behalf, &c. Judgment having been rendered in the action against the defendants, by default, the plaintiff's counsel filed in Court the following motion, which was entered on the record. "In this cause, brought before this honorable Court to recover the forfeiture of the condition, annexed to the said bond of recognizance, set forth in the plaintiff's declaration, the forfeiture, breach and non-performance, having been made to appear to this Court, by the default of the defendant, and the sum being uncertain for

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Benham vs. Sage et al.

which judgment ought to be rendered, the plaintiff requests that the same may be assessed by a jury, agreeably to the statute in such case made and provided.

The Court refused to grant the request, which is thus entered on the record. "Which motion the Court overruled and dismissed." Then follows a motion made by the defendants, that the Court would assess the sum which ought to be recovered, "and thereupon the Court do adjudge, that the plaintiff recover of the defendants one cent damages and his costs, taxed at ———

To reverse this judgment, Benham the plaintiff brought a writ of error, assigning, for error, the refusal of the County Court, to direct the damages to be assessed by a jury. To which the defendants pleaded, in *nullo est erratum*.

Wright, for the plaintiff in error. The action in the Court below was brought on a recognizance, with a condition, which is set forth at large in the declaration. The breach of which condition, appeared, or rather, was conceded by the default of the defendant; and the sum for which judgment ought to be rendered, was uncertain. And the plaintiff and the defendant, had each a right by the seventy fifth section of the judiciary act, to require the damages to be assessed by a jury. The words are express, "Where the sum for which judgment should be rendered is uncertain, the same shall, at the request of either party, be assessed by a jury." The plaintiff, therefore, had in this case a right to an assessment of damages by a jury; and his motion for such an assessment, and the refusal of the Court, appearing on the record, it is error.

Fay, for the defendant. The sum, which the plaintiff ought to have recovered in this case. was not uncertain; he was, at law, entitled to recover the penal sum of the recognizance. When the defendants applied to the Court for an assessment, then, and not till then, the sum became uncertain. The plaintiff was, therefore, premature, and his motion was rightfully and properly dismissed.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. The seventy fifth section of the judiciary act, is in these words, "That in all cases, brought before either of the County Courts, or the Supreme Court of judicature, to recover the forfeiture annexed to any articles of agreement, covenant, bond

of recognizance, with a condition thereto annexed, contract, charter party, or other specialty, where the forfeiture or non performance, is found by the verdict of a jury, or by the default or confession of the defendant, or upon demurrer, the Courts respectively, before whom such action is pending, are hereby authorized and empowered, to moderate the rigor of the law, and render judgment therein, for the plaintiff to recover so much as is due, according to equity and good conscience, and award execution accordingly. And when the sum, for which judgment ought to be rendered, is uncertain, the same shall, on the request of either party, be assessed by a jury." In all cases, coming within the equitable provisions of this section, the plaintiff has a right, as well as the defendant, to apply to the Court, for the ascertainment of the sum for which judgment ought to be rendered. The plaintiff is under no necessity, if the defendant neglect to apply to the Court, to take judgment for the whole penalty, and thereby, at least in some cases, expose himself to a suit in chancery, by the defendant, for relief. The plaintiff may, indeed remit, where the sum which he ought to recover is certain, or capable of being reduced to a certainty by computation, as in the case of principal and interest: in this case, the sum which the plaintiff ought to recover is uncertain. But, it is said that the plaintiff was premature, in his motion; that, until the defendant had moved to chancer the recognizance, the plaintiff was entitled to a sum certain, the whole amount of the penal sum; that the uncertainty, as to the sum to be recovered, arose from the motion of the defendant: but this argument, is wholly groundless. The uncertainty referred to by the statute, is not an uncertainty, as to the sum, which the plaintiff is entitled to recover, according to the strict rules of the common law, but an uncertainty, as to the sum, which he ought to recover, in equity and good conscience. And it is because the uncertainty already exists, which, in this case, appears from the nature of the condition, as set forth in the declaration, that either party has a right, from the statute, to apply to the equitable authority of the Court. Indeed, I am of opinion, that, in a case like the present, where the equity of the case is apparent on the face of the record, the Court ought not, should the defendant, never come into Court, to permit the plaintiff to take judgment for the whole penalty, as a matter of course, any more than to permit the plaintiff, in an

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action of *assumpsit*, for goods sold and delivered, to take judgment for the full amount of the *ad damnum*, or for the sum which the plaintiff averred the goods to be worth. The Court, in every such case, ought to compel the plaintiff to take judgment, for that sum only, which, shall by an assessment appear to be due. It follows that the plaintiff's motion in this case, made in the County Court to have the damages assessed, or rather the sum due in equity ascertained by a jury, was legal and proper, and that the dismission of that motion renders the judgment erroneous, for which it must be reversed.

POND *qui tam vs.* SAGE.

An inhabitant of a town is a competent witness in a suit, brought to recover a penalty, although part of the penalty, if recovered be payable to the treasury of such town—clearly, if such inhabitant is not liable to pay taxes to such town.

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THIS was an action brought on the statute, against Sage, for transporting a pauper into the town of Readsborough, with an intent to make the town of Readsborough chargeable with the maintenance of the pauper, to recover the penalty given by statute, one half for the prosecutor, and the other half for the town of Readsborough.

On trial to the jury, at the last term, Joseph Hartwell, an inhabitant of Readsborough, was produced as a witness on the part of the plaintiff. The counsel for the defendant, objected to the admission of the witness, on the ground, that the town of Readsborough was entitled to a moiety of the penalty, if recovered, and that Joseph Hartwell, being an inhabitant of Readsborough, was interested in the event of the suit, and therefore an incompetent witness. The objection was overruled by the Court, and the plaintiff obtained a verdict, Hartwell being a principal witness on his part. A motion was made by the counsel for the defendant, for a new trial, on the ground that Hartwell was an incompetent witness, and illegally admitted.

The motion was continued to this term, and came on to be heard on the statement of judge Fay, one of the judges, who tried the

cause. He stated the case as above, and added, that, although Hartwell was an inhabitant of Readsborough, yet he was not liable to be rated, or to pay taxes to said town.

Young and *Fay*, in support of the motion, contended that Hartwell, being an inhabitant of Readsborough, was an incompetent witness in the case, whether liable to pay taxes in the town or not; that the action, being brought, as well in behalf of the town, as in behalf of Pond, the prosecutor, the town, and consequently, all the inhabitants of the town, are in fact plaintiff's—parties to the suit, and no party to a suit can be admitted as a witness.

Langdon and *Skinner*, for the plaintiff. A town being a public corporation, the inhabitants, members of the corporation, are competent witnesses, in any matter relating to the town in its public capacity, Swift's Evidence, 506. But it is unnecessary to decide that question in this case, for it has always been holden at common law, that parishioners, not liable to be taxed for the support of the poor, were competent witnesses in pauper causes, for or against the parish, of which they were inhabitants.—Gilbert's Evidence, 243. And in the present case, it appears, that Hartwell, the witness, was not liable to be taxed in the town of Readsborough.

The opinion of the Court was delivered by

Chipman, Ch. J. It is a point clearly settled, that members of a private corporation cannot be witnesses, in questions relating to the rights of such corporation; but, as it relates to public corporations, the question seems not to be so well settled. In England, those corporations, which may be called public corporations, such as cities, boroughs &c. have, for the most part, some distinct rights, which, as to such corporations, are in the nature of private rights. In the exercise of such rights, they are to be considered, as private corporations. But these corporations have powers, which are in fact a portion of the public government of the kingdom, which they exercise with local, and other limitations. They have also certain powers of self government; such as the power of making by laws for the government of their own members, and of carrying them into effect, by penalties, and by prosecutions in the Courts of the corporation. In this respect, their situation is different from that of a private corporation. In prosecutions under such by laws to recover a penalty to the use of such corporations, there is no

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more reason why the members of such corporation, should, on account of their interest, be considered as incompetent witnesses, than there is, that the citizens of this state, in a prosecution to recover a penalty, to the use of the State, should be considered as incompetent witnesses, on account of their interest. In such cases, the difficulty seems to arise for want of a clear distinction between public and private interests; they are often so blended, that it is difficult to mark the precise line which divides them.

In this State, towns are not only public corporations, but are, in a good degree, constituent parts of the great body politic; and are entrusted, each within its own limits, with many functions of the public government. Taken in this view, I should be strongly inclined to admit the members of town corporations as witnesses, agreeably to the rule laid down by Swift. But, in the present case, it is not necessary to decide this question; for as Hartwell, the witness, although an inhabitant of Readsborough, was not liable to pay taxes to the town, the Court are unanimously of opinion, that, by the settled rules of the common law, he was a competent witness, there must therefore be

Judgment on the Verdict.

See the following act, passed the second day of November, 1816, by which it is enacted, "That, hereafter, when any cause shall be pending before any Court in this State, wherein a co nty, town, city, borough, parish or school district, is a party, or interested, the inhabitants of such county, town, city, borough or shool district, (who are not otherwise disqualified,) shall be admitted as competent witnesses, in such case, any law or usage to the contrary notwithstanding."

POOL *vs.* PRATT.

A promise of Marriage, made by an infant is void.

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THIS was an action of *assumpsit* on a promise of marriage.—The declaration was in common form, alledging that the promise was made on the first day of December, 1811.

The defendant pleaded in bar, that the said Rachael Pool ought not to have or maintain her said action thereof against the said E. B. Pratt, for that he the said E. B. Pratt, at the time of making the

said supposed promise and undertaking, in the plaintiff's declaration alledged, was an infant within the age of twenty one years, to wit, of the age of twenty years.

To this plea there was a demurrer and joinder.

Young, for the plaintiff.

Wright and *Fay*, for the defendant.

CHIPMAN, Ch. J. delivered the opinion of the Court. It is an ancient doctrine, as old as the common law, that an infant shall not, in general be bound by his contract; he is under an incapacity to bind himself by his contract—that executory contracts by an infant are void. Some contracts made by an infant, however, are not void, but voidable only, which he may affirm, or disaffirm at full age.

This incapacity of an infant is his privilege, and is intended for his advantage, to protect him from those impositions, to which, from his inexperience, he is perpetually liable. This priviledge does not extend to an adult contracting with an infant; an adult, contracting with an infant, may be bound, although the infant be not. There are, indeed, exceptions to this general incapacity, which being intended for the advantage of the infant, yields, in cases of necessity, to which if it were extended,it would counteract its object. Thus, an infant may bind himself for necessaries; such as necessary diet, apparel and learning; otherwise, that, which the law intended for his benefit, might prevent him from obtaining, even the means of subsistence. But, in these cases, the contract must be left open to the Court and jury, to determine whether it was for necessaries, suitable to his degree and condition in life: and it has been held, with great propriety, that an infant, living with his parent and supported by him, cannot be bound for necessaries. The rule then is general, that an infant cannot be bound by his contracts, but admits of certain exceptions.

It has been urged, in this case, that a contract to marry, is within the exception; that, at common law, infants, a male at fourteen, and a female at twelve years of age, are capable of consenting to marriage; that a marriage, actually contracted and solemnized, between infants beyond their respective ages of consent, is valid and binding. And, hence, it has been contended on the part of the

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plaintiff, that where the law allows an act to be performed, and when performed by an infant, deems it valid, and binding, it is a lawful act for an infant to perform, and that he will be bound by his contract to perform such act; that he will, therefore, be bound by his executory contract to marry. But this does not follow as a legal consequence. The age of consent, was, I believe, fixed at common law, in conformity to the cannon law. In England, in former times it was very usual, for parents and guardians, to contract their children and wards in marriage, and actually solemize the nuptials, long before the age of consent. But the law allowed the infants in such case, as they respectively arrived at the age of consent, to annul the contract, by dissenting from it, or affirm it by their consent. The same law also considered a marriage, actually contracted and solemnized between infants, after their respective ages of consent, valid, although entered into without the consent of parents or guardians. This was for reasons, partly religious and partly moral, which it is not necessary now to explain. Our statute concerning marriage, which I shall have occasion again to mention, seems to have adopted the same reasons, and allows such marriage, actually solemnized to be valid, notwithstanding the want of consent of parents or guardians. Still, the consequence, contended for, does not follow. An infant is bound by his contract for necessaries, but it must be a contract executed by an actual delivery and receipt of the necessaries to his use; and if he contract to purchase articles ever so necessary, he is not holden by his contract to receive and pay for the articles. In this view then, a contract of marriage by an infant, and his contract for necessaries are perfectly analogous; in both cases, the contract when consummated is binding, but while executory is not binding; and so the contract of an infant to marry has always been considered in the law.

This occasioned the doubt in the case of Ward against Clarence, Strange 937, whether the promise of the infant, plaintiff, was a good consideration to support the action against the defendant, who was of full age. The plaintiff was an infant *feme;* the defendant pleaded *non assumpsit*, and a plea in bar, that the plaintiff, at the time of the promise made, was an infant fifteen years of age. To the plea of infancy there was a demurrer.

The cause was several times argued; at first, it was doubted, by the Court, whether such promise by an infant, which, it was conce-

ded, she could not be holden, at common law to perform, could be a good and sufficient consideration in that action. It was suggested that, although the defendant might not have a mutual remedy at law, yet, as she was of the age of consent, she might be compelled to perform the contract in the Ecclesiastical Court; the Court, therefore, ordered an argument by civilians; but no instance could be found, in which the Ecclesiastical Court had compelled the performance of a minor's contract.

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The Court, in giving judgment, which was for the defendant, say, "We consider it on the footing of the common law, and, upon that, the single question is, whether this contract as against the plaintiff was absolutely void. And we are all of opinion that this contract is not void, but voidable, at the election of the plaintiff. And no dangerous consequences can follow from this determination, because our determination protects the infant, even more than if we rule the contract to be absolutely void. And, as to persons of full age, it leaves them where the law leaves them, which grants them no protection against being drawn into such inconvenient contracts." Thus it is clear, from this case, that an infant is not bound by a contract to marry, more than by any other executory contract; nor is there any dictum, to my recollection, in any case, to the contrary of this opinion.

Our statute concerning marriage certainly adopts the same principle. By the fourth section of that act, it is made penal, for any minister or magistrate, authorized to solemnize marriage, to join any person in marriage, before he shall be certified of the consent of the parent, master or guardian, if either party be a minor. The minor here is denied the privilege of carrying such contract into effect without the consent of a third person, the parent, master or guardian. The minor is considered as a person not *sui juris*.—Such are the principles of the common law, and such are the principles of our statute.

We know nothing of this case, but what appears from the pleadings; from which, it appears, that both parties to the contract were minors, and incapable of contracting. There may be some hardship in this particular case; but the rules of law are general—they are calculated for the general State, for the general good of society, and are not to be warped to serve a particular case. Upon this subject, of a contract to marry by an infant, there ought, if upon any

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subject, to be an undeviating adherence to the rule. It would be very absurd, indeed, that the law, which does not trust an infant with discretion to bind himself, by a contract to purchase an unnecessary Jewsharp, should, nevertheless trust his discretion with a contract, in the most important concern of life; on the prudence of which, depends his own future happiness and prosperity. What parent could wish to be placed in a situation so dangerous for his child, so unfortunate for himself! Could a law be endured, which should enable an infant, in a momentary delirium of youthful passion, to set at naught parental authority, and place himself in a situation to render unavailing all the counsel and advice of his nearest and dearest friends? Certainly the law, as it has been established, is wisest, best, and in every view, most salutary. That law which pronounces an infant to be incapable of binding himself, by his contract, except for necessaries, actually furnished, clearly extends to this case; the consequence is that there must be

Judgment for the defendant.

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STARR *vs.* ROBINSON, in error.

A special act of the legislature freeing the body of a debtor from imprisonment, and providing that "all such bonds as have been taken by the Sheriff, on the admission of the debtor to the liberties of the prison, be discharged," is not construed to extend to a case where the debtor had committed an escape from the liberties of the prison, before the passing of the act; and, if such act be so worded, as to extend to such case, it is a law impairing the obligation of contracts, a violation of the constitution of the U. States, and void.

THE original action in this case was on a gaol bond assigned by the Sheriff to the creditor, in which the plaintiff declared, that, by the consideration of the County Court for the County of Bennington, at the term of said Court holden in June, 1810, he recovered judgment against Moses Sage, for the sum of $65,63 cents damages, and for the sum of $15,42 cents, costs of suit; that he prayed out an execution on that judgment, by virtue of which, the said Moses Sage, on the 24th day of August, 1810, was committed to the common gaol in Bennington, and was, on the same day admitted to the liberties of said prison; that on that occasion, the said Moses Sage, as principal, and Jonathan Robinson, the now defendant, as surety, executed the bond, on which this action is brought. That, on the same day the said Moses Sage, escaped from the liberties of the prison, and thereupon the Sheriff assigned the bond to the plaintiff Starr, the creditor. The action was commenced by Starr, the creditor, as assignee of the bond against Jonathan Robinson, the surety, on the fifth day of October, 1811, before the County Court for the County of Bennington.

The defendant pleaded in bar an act of the legislature, passed on the thirty first day of October, 1811, entitled an act, for the relief of Moses Sage, setting forth the act in *haec verba* in the plea. The following part of the first section only is material in the case. "It is hereby enacted &c. that the said Moses Sage, is released and discharged from his said imprisonment in said gaol (referring to a recital in the preamble of the act) and shall be free from arrests on all process in civil actions, issuing under the authority of this State, for and during the term of three years from and after the first day of January 1812.

"Provided, that the judgments, on which the said Moses is confined, shall remain in the same situation, as though writs of execu

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Benham *vs.* Sage *et al.*

which judgment ought to be rendered, the plaintiff requests that the same may be assessed by a jury, agreeably to the statute in such case made and provided.

The Court refused to grant the request, which is thus entered on the record. "Which motion the Court overruled and dismissed." Then follows a motion made by the defendants, that the Court would assess the sum which ought to be recovered, "and thereupon the Court do adjudge, that the plaintiff recover of the defendants one cent damages and his costs, taxed at ———

To reverse this judgment, Benham the plaintiff brought a writ of error, assigning, for error, the refusal of the County Court, to direct the damages to be assessed by a jury. To which the defendants pleaded, in *nullo est erratum*.

Wright, for the plaintiff in error. The action in the Court below was brought on a recognizance, with a condition, which is set forth at large in the declaration. The breach of which condition, appeared, or rather, was conceded by the default of the defendant; and the sum for which judgment ought to be rendered, was uncertain. And the plaintiff and the defendant, had each a right by the seventy fifth section of the judiciary act, to require the damages to be assessed by a jury. The words are express, "Where the sum for which judgment should be rendered is uncertain, the same shall, at the request of either party, be assessed by a jury." The plaintiff, therefore, had in this case a right to an assessment of damages by a jury; and his motion for such an assessment, and the refusal of the Court, appearing on the record, it is error.

Fay, for the defendant. The sum, which the plaintiff ought to have recovered in this case. was not uncertain; he was, at law, entitled to recover the penal sum of the recognizance. When the defendants applied to the Court for an assessment, then, and not till then, the sum became uncertain. The plaintiff was, therefore, premature, and his motion was rightfully and properly dismissed.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. The seventy fifth section of the judiciary act, is in these words, "That in all cases, brought before either of the County Courts, or the Supreme Court of judicature, to recover the forfeiture annexed to any articles of agreement, covenant, bond

of recognizance, with a condition thereto annexed, contract, charter party, or other specialty, where the forfeiture or non performance, is found by the verdict of a jury, or by the default or confession of the defendant, or upon demurrer, the Courts respectively, before whom such action is pending, are hereby authorized and empowered, to moderate the rigor of the law, and render judgment therein, for the plaintiff to recover so much as is due, according to equity and good conscience, and award execution accordingly. And when the sum, for which judgment ought to be rendered, is uncertain, the same shall, on the request of either party, be assessed by a jury." In all cases, coming within the equitable provisions of this section, the plaintiff has a right, as well as the defendant, to apply to the Court, for the ascertainment of the sum for which judgment ought to be rendered. The plaintiff is under no necessity, if the defendant neglect to apply to the Court, to take judgment for the whole penalty, and thereby, at least in some cases, expose himself to a suit in chancery, by the defendant, for relief. The plaintiff may, indeed remit, where the sum which he ought to recover is certain, or capable of being reduced to a certainty by computation, as in the case of principal and interest: in this case, the sum which the plaintiff ought to recover is uncertain. But, it is said that the plaintiff was premature, in his motion; that, until the defendant had moved to chancer the recognizance, the plaintiff was entitled to a sum certain, the whole amount of the penal sum; that the uncertainty, as to the sum to be recovered, arose from the motion of the defendant: but this argument, is wholly groundless. The uncertainty referred to by the statute, is not an uncertainty, as to the sum, which the plaintiff is entitled to recover, according to the strict rules of the common law, but an uncertainty, as to the sum, which he ought to recover, in equity and good conscience. And it is because the uncertainty already exists, which, in this case, appears from the nature of the condition, as set forth in the declaration, that either party has a right, from the statute, to apply to the equitable authority of the Court. Indeed, I am of opinion, that, in a case like the present, where the equity of the case is apparent on the face of the record, the Court ought not, should the defendant, never come into Court, to permit the plaintiff to take judgment for the whole penalty, as a matter of course, any more than to permit the plaintiff, in an

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tion had never issued thereon; and that all such bond or bonds as have been taken by the Sheriff, or keeper of the gaol in said Bennington, for the liberties of the prison granted to the said Moses Sage, be, and the same are hereby discharged. And provided any action or actions should be brought against the Sheriff of said County, or any of the bail of the said Moses, on account of his being released, this act shall be considered as a sufficient bar to a recovery; and the defendant or defendants shall recover costs." To this plea, the plaintiff demurred; and the County Court rendered judgment for the defendant; to reverse which judgment this writ of error was brought, and the general error assigned, to which the defendant pleaded in *nullo est erratum.*

Wright, for the plaintiff. The act pleaded in bar does not extend to the bond on which the action, in this case, was brought; for although, the bond was given on granting the liberties of the prison to the said Moses Sage, yet it was not given in consequence of any execution, or any civil process on which the said Sage was imprisoned, at the time said act was passed; and from such imprisonment only, was the act intended to release and discharge him. The provision in the act respecting gaol bonds, is limited to those bonds only, in a suit on which, by the creditor, the fact of Sage's going at large, in consequence of his release by the act, should be alledged as a breach of the condition. By the record, in this case, it appears that Sage was not imprisoned on the execution in favor of Starr, at the time the act was passed; he had before been committed to prison on the execution, had given the bond in question for the liberties of the prison, had departed from the liberties and was at large; the bond had been assigned, and a suit on the bond commenced before the act was passed. It cannot, therefore, be said that Sage was discharged from his imprisonment on the execution in favor of Starr, by virtue of that act; and consequently the bond in question is not within the provisions of the act.

Skinner for the defendant. From the nature of the act in question, being an act granting relief to Moses Sage, for reasons recited in the act, it ought to be construed liberally for the attainment of that relief, in a full and ample manner, according to the intention of the legislature.

The act contains two provisions; one to release the body of

Moses Sage from imprisonment, the other to discharge all bonds taken for the liberties of the prison granted to Sage. The words of this last provision are, "that all such bond or bonds as have been taken by the Sheriff or keeper of the gaol, in said Bennington, for the liberties of the prison granted to said Moses Sage, be, and the same are hereby discharged." The words of the act clearly extend to all such bonds, which had, at any time been taken by the Sheriff and then remained in force, not discharged or satisfied. From the force of the expressions, the act extends as well to all bonds taken for the admission of Sage to the liberties of the prison, on occasion of any former imprisonment, as to those taken on occasion of his imprisonment, at the time of passing the act. Justice also requires this construction; for, as the body of Moses Sage the principal is, by the act, freed from arrest and imprisonment in all civil cases; without any exception, it is unjust that the bail should remain liable, while the act deprives him of his full remedy over against Sage.

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The opinion of the Court was delivered by

Chipman, Ch. J. The act of the legislature, which is relied upon in this case, is not a public act, nor is it a remedial act, in the language of the law. It is a private act, and has been rightly so pleaded. It is an act which gives a privilege to one man, while it infringes, or at least suspends the rights of another; therefore, upon every sound principle, it ought to receive a strict construction; it is not to be extended in favor of Moses Sage or his sureties, beyond that which is clearly expressed, or that which is a necessary and unavoidable inference. Now if the act had gone no farther than to discharge Moses Sage from his imprisonment, and to permit him to go at large, without expressly declaring, that the Sheriff, or the sureties for the liberties of the prison, should not be liable, on the departure of Sage, as for an escape, yet they would not have been liable; such is the necessary inference, the necessary consequence of a legal discharge of the prisoner. If it was lawful for Sage to go at large under the authority of this act, the condition of the bond was not broken by his departure, as he was legally discharged from imprisonment, in every case of a civil nature, for which he then stood committed: but to construe the act to purge an escape before that time committed, would be wholly unwarrant-

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ed—it would be a flagrant abuse of every just principle of construction.

But, it is said, the act is too clear to admit of construction, that the words are express, "that all bond or bonds, which have been taken by the Sheriff or keeper of the gaol in Bennington, for the liberties of said prison granted to the said Moses Sage, be, and the same are hereby discharged." The act, indeed, sets out with a very broad expression, "all bond or bonds" and if this clause were not explained by what precedes and what follows, it might almost afford a pretext for the defendant's construction. But this is to extend the act beyond the manifest intention of the legislature as expressed in the preamble, which is to discharge Moses Sage from his confinement in prion, at that time, and to free his body from arrest, for a certain limited time; there is not a word respecting a discharge of his sureties, who had become liable; and the clause which has been relied on, does not affect his sureties. Actions may be maintained against them, and they may have their remedy over against Sage. They may proceed by summons, or attachment of his property, for that is not by the act intended to be exempted. And, although it is crudely expressed, as is almost every part of this act, yet what follows, and closes this particular provision, draws it towards a point, and the whole intelligibly limits the sense. It makes, with what has just been recited, but one provision. "And provided (or in case) any action, or actions shall be brought against the Sheriff or any of the bail (sureties in such bonds) of the said Moses, on account of his being released (certainly meaning, on account of Sage's going at large, in consequence of his being, by the act, so discharged,) this act shall be considered a sufficient bar, &c." It makes but one provision, and when read, so as to render it intelligible, is found to have been intended to express what, as before observed, is a legal consequence of a discharge of the principal from his imprisonment—and is no more than, that Sage's going at large, shall not be deemed an escape: although the person who drew the act, seems not to have been aware of the legal inference, or to know how to introduce it by express provision. Such bills are usually drawn by some private friend of the petitioner, and are often passed with too little attention to propriety or accuracy of expression.

It ought further to be observed, that had the provision under

consideration, been so clearly expressed, as clearly to admit of the defendant's construction, yet it could not avail him, it could not be permitted to operate—it would have been a palpable violation of the constitution of the United States, which renders null and void every act, even of a State legislature, made in violation of any express provision of that constitution. In that instrument it is expressly declared that no State shall pass any law impairing the obligation of contracts. Now, whatever may be said with respect to a gaol bond, before the condition be broken—whether it be considered as a contract, to which the creditor is a party, or, if I may so say, a substitute for the walls of the prison—as a mean of securing the confinement of the debtor, yet when the condition of such bond is broken, and the bond is assigned by the Sheriff to the creditor, it undeniably becomes a contract,between the creditor, the assignee, and the signers of the bond. In this case, the condition of the bond had been broken, the bond had been assigned to the creditor, and a suit commenced on the bond by him before the passage of the act. The contract was legal and complete, and the creditor has every just right to claim the benefit of that provision in the constitution of the United States, which was made by the people of the United States, to protect their rights against such acts of the State legislatures as should inadvertently, or otherwise be passed in violation of those rights. The creditor, as one of the people has a right to claim the benefit of this provision, and that it be held, by the Court, sacred and inviolate. And, certainly, the Court ought anxiously to avoid any construction of a law, which would imply in the legislature, either an ignorance of their powers and duties, or a design to violate the national constitution. From all these considerations, the Court are clearly of opinion that the judgment of the County Court is erroneous, and must be reversed.

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HOIT *vs.* BRADLEY and others, in error.

If an administration bond be prosecuted before a County Court, and a judgment rendered for the penal sum of the bond, a scire facias brought on such judgment, by a creditor, or other person interested in the estate, to recover the amount of his claim agreeably to the statute, must be brought before the same Court, notwithstanding such claim, as to the amount of the demand, be within the jurisdiction of a justice of the peace

ON the granting of adminstration, by the judge of Probate for the district of Manchester, to Gilbert Bradley and Ethan Bradley, on the estate of Lemuel Bradley deceased, they, as principals, and Edmond Graves, as surety, executed a bond to the Judge of Probate, in the penal sum of $4000, in the form and with the condition prescribed by statute, bearing date the ninth day of January 1801. The estate was represented insolvent, and on the report, by the commissioners of the claims allowed against the estate, it proved to be insolvent, and a dividend was made to and among the creditors, and the sum found due to each creditor, was ordered by the Judge, to be paid within a certain time limited. The claim of Jonathan Hoit, the plaintiff, allowed against the estate amounted to $103,15 cents, his dividend on which, amounted to $31,89 cents, which the administrators had neglected to pay.

At the June Term of Bennington County Court, 1806, an action was commenced on the administration bond, against the present defendants, on the prosecution of Cephas Smith, jun. a creditor of the estate. In that action the defendants suffered Judgment by *nil dicit*, and Judgment was rendered for $4000, the penal sum of the bond, and, agreeably to the provision of the 103d. section of the Probate act, Cephas Smith, jun. the plaintiff in that action, assigned a breach of the condition of the bond, in the non payment of the sum which had been ordered to be paid as his dividend of the estate, and recovered Judgment for that sum and his costs, and had execution.

Afterwards, Jonathan Hoit the present plaintiff, brought a *scire facias* against the present defendant, on the aforesaid Judgment for the penal sum of the bond; and, to entitle him to an execution agreeably to the statute, assigned a breach of the condition of the bond, in the non payment of the aforesaid sum of $31,89 cents, which the administrators had been ordered to pay him, as his divi-

dend of the estate. The defendant's counsel pleaded in abatement, to the jurisdiction of the Court, for that the sum demanded being under $53, a Justice of the peace had exclusive jurisdiction of the action; and thereupon the County Court ordered the action dismissed, and rendered Judgment for the defendants to recover their costs. Whereupon the plaintiff brought this writ of error, and assigned for error, the dismission of the suit, and the judgment that the defendants should recover their costs.

To this writ of error the defendants pleaded, in *nullo est erratum.*

Langdon and *Sperry*, for the plaintiffs.

Skinner and *Sheldon*, for the defendants.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. We are all clearly of opinion, not only, that the County Court had jurisdiction in this case, but that the remedy by *scirefacias*, can be had in that Court alone, where the judgment for the pénal sum of the administration bond, remains of record.

The proceedings in this case are not under the provisions of the Judiciary act, but under a provision contained in the 103d section of the probate act, it is a special provision, in a particular case.

By another provision of the probate act, the administration bond is directed to be taken to the Judge of probate, granting administration; the general purpose of the condition of that bond is, to secure a faithful administration—to secure right and justice to be done by the administrator, to all who may have any interest in, or claim upon the estate. One part of the condition is, that the administrator, shall, on the settlement of the estate, deliver and pay to such person or persons respectively, as the Court of probate, by their decree or sentence, pursuant to the true intent and meaning of the law, shall limit and appoint. This condition extends, as well to the debts and demands allowed and ordered to be paid, as to the distribution of the estate.

The remedy on this bond, provided by the 103d section of the probate act, before mentioned, is in substance—that, on application to the Judge of probate, by any person, who shall have been injured by a breach of the condition of the bond, the Judge, shall, on such applicant's giving security for prosecution and the payment of costs, cause an action to be brought, in his, the judge's name, on the

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bond; and shall certify to the Court in which the action shall be commenced, the name of the applicant, who shall be deemed the prosecutor. And, if the defendant shall plead performance of the condition, the prosecutor may assign as many breaches, affecting his interest, as he shall see fit; and the jury shall, on all the issues, assess damages for such breaches as the prosecutor shall prove; and, if a verdict be found against the defendant, the Court shall enter up judgment for the whole penalty of the bond, and shall issue execution in favor of the prosecutor, for such damages as shall be found for him, and for costs. There is also a provision, in case of judgment on demurrer, confession or *nildicit;* and it is enacted, that the judgment for the penalty of the bond, stand as a security for any other or further breach of the condition of such bond. And, that any person thereafter, who shall have been injured, by the breach of the condition of such bond, may prosecute a *scirefacias*, on such judgment for the penal sum of the bond, against the defendants, and may assign any breaches affecting his right and interest, which being found, damages shall be assessed, and execution shall issue as in the former case.

Now as to the question of jurisdiction, this case differs not from a bond of indemnity, or any bond with a defeasance—the penalty of the bond, not the sum due by the condition, or the amount of damages sustained by a breach, determines the jurisdiction. This bond is, in effect, a bond of indemnity, and the statute puts the prosecutor for his own interest in the place of the obligee, who is in fact no more than a trustee. Nor is it any objection, that the prosecutor might have resorted to another remedy, which might change the jurisdiction: that the prosecutor might in this case have brought an action of debt or *assumpsit*, for the amount of his demand allowed by the commissioners, and ordered by the judge to be paid, before a justice of the peace. In all cases where there are different remedies, it is at the option of the plaintiff which he will pursue—that, of course, which he thinks most for his advantage, most effectual.

In a case like the present, the administrators might have become insolvent: the creditor is under no obligation to try that question, before he shall resort to the bond.

I will put a case—An intestate had in his lifetime, recovered a judgment in the Supreme Court for a sum less than fifty three dol-

lars, a sum clearly within the jurisdiction of a Justice of the peace; the administrator may have the effect of that Judgment by an action of debt, or assumpsit, before a Justice of the peace, he may also have a *scirefacias* to revive that Judgment, before the Supreme Court: no one will question his right to revive the Judgment by *scirefacias*, which must be brought in the same Court where the Judgment remains of record, and can be brought in no other Court. The law in the present case is the same; the Court, therefore reverse the Judgment of the County Court. And as the record of the judgment, upon which the *scirefacias* was brought, is not in this Court, but remains in the Court below, this Court cannot proceed to render the proper judgment—the cause is, therefore, remitted to the County Court, to proceed thereon as to law and justice appertains.

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Hoit *vs.* Bradley et al.

HENRY *vs.* HENRY.

In an action on a warranty upon the sale of a horse, if the declaration alledge that the defendant warranted that the horse was not over seven years old, and the proof be that the defendant warranted that the horse was seven years old, the next spring after the sale, it is not a variance between the proof and the declaration.

THIS was an action of *assumpsit*, in which, the plaintiff declared, in substance, that, on the nineteenth day of February, 1811, the plaintiff bought of the defendant, and the defendant sold to the plaintiff, a certain mare for the sum of one hundred dollars, then and there paid by the plaintiff to the defendant; and that the defendant, on the sale, in consideration thereof promised the plaintiff that said mare was not more than seven years old, and that she was every way sound. And assigned, as a special breach of the promise, that the mare, at the time of the sale, was more than seven years old—that she was nine years old—that she was wind-broken, diseased and unsound; all which the defendant well knew.

Windham, August. 1814.

On trial to the jury, upon the general issue, the plaintiff offered in evidence, to prove the sale and warranty, a bill of sale of the mare, signed by the defendant, in the following words and figures,

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to wit: February 19, 1811. Joseph Henry bought of Samuel Henry, one dark chesnut mare, seven years old next spring, warranted to be every way sound, received pay.

SAMUEL HENRY.

C. Marsh, for the defendant, objected to the evidence, on the ground that the contract in writing, which was produced, varied from the contract stated in the declaration; for that the declaration stated the promise to be, that the mare was not more than seven years old, whereas by the writing produced, it appears that the contract was, that the mare would be seven years old the next spring after the sale.

By the Court. There is no variance, in substance, between the declaration and the proof, and the plaintiff has not declared on the written instrument. A promise that the mare would be seven years old the next spring after the sale, is in substance, a promise that she was not *more* than seven years old at the time of the sale. If it be considered that the warranty contained in the bill of sale, extends to the age of the mare, there is no material variance between the declaration and the evidence.

The evidence was admitted and the jury found a

Verdict for the plaintiff.

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RIDER *vs.* ALEXANDER and KATHAN.

In an action of ejectment against landlord and tenant, an appearance, entered by attorney, for both defendants, is not conclusive against the landlord, but he will be permitted to prove, by whose order or procurement, the attorney entered such appearance,

And, even, if it appear that the attorney entered such appearance, by the directions of the landlord, yet this will not preclude the landlord from shewing that the judgment, rendered in the action against him, was obtained by collusion between the plaintiff and the tenant.

If the judgment recited in an execution, as the judgment on which it issued, purport to have been entered up at one term, and the record produced to support such execution, be of a judgment entered up at another term, such execution is irregular, and all the proceedings had under it are void.

If, in a trustee action, judgment be rendered, both against the principal debtor and the trustee, and one execution issue on both judgments against the principal debtor and the trustee, such execution is irregular and void.

If an action be commenced against a person, not residing within this State, and the plaintiff, without giving to the defendant personal notice of the suit, take judgment at the first term, such judgment is irregular and void.

THIS was an action of ejectment for a farm of land in Dummerston in the County of Windham. On trial to the jury, upon the general issue, the counsel for the plaintiff, stated, that, to support the plaintiff's right to recover in this action, they should first shew a title to the premises in Silas Taft, and then, a judgment in favor of the present plaintiff, Rider, against Silas Taft, recovered before the County Court, for the County of Windham, June term, 1810, for the sum of $291,83 cents, an execution upon that judgment; and a levy of that execution upon the premises, as the property of Taft; by which they were regularly set off to the plaintiff, and the legal title vested in him.

It was proved, that Taft took possession of the premises, in the year 1790, claiming the same in his own right; and continued in the undisturbed possession of the premises, by himself and his tenant until the year 1810. Taft had removed from the state in the year 1810, having let the premises to a tenant, by the name of Belknap, who continued in possession, under Taft, until some time in the year 1810, when he delivered possession of the premises to Giles Alexander, one of the defendants.

Taft's title to the premises, being thus established by peaceable possession in his own right for more than fifteen years, the plain-

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tiff's council then produced copies of the record of a judgment, in favor of the present plaintiff, against Taft, of an execution issued thereon, and of the officers's return thereon endorsed.

It appeared, from the record, that Benjamin Rider, the present plaintiff, commenced his action before the County Court for the County of Windham, June term, 1807, against the said Silas Taft, as an absconding or concealed debtor, and summoned one Barnes, as Trustee of Taft. It appeared that judgment was rendered in that action against Taft, the absconding debtor at the first term, for $291, 38 cents; and, after sundry continuances, at June term 1811, Barns, who had been summoned as trustee, was found to be Taft's trustee, and had monies in his hands belonging to Taft, to the amount of $49,38 cents. Barns' costs were taxed and allowed at $39,90 cents, which being deducted from the amount of Taft's money, found in his hands, left a balance of $9,48 cents to be applied on the judgment against Taft. The record concludes in these words, "that the plaintiff have his execution for the balance found due in the hands of said trustee, being $9,48 cents, as well as against the said Silas Taft, for his damages aforesaid and his costs, taxed, at the present term at $41,42 cents." Execution issued on the second day of October, 1810, reciting the judgment against Taft as recovered at June term, 1810; although the damages had been assessed, and the judgment entered up at June term, 1807. The execution also recited the judgment against Barns, the trustee, as having been rendered June term, 1810; and directed the officer to collect of Barnes, the trustee, the said sum of $9,48 cents. and to collect the residue of the said judgment of Taft, to be levied of his goods, chattles or estate. Which execution was by the constable of Dummerston, on the fourth day of October, 1810, levied, for the residue of the judgment against Taft, on the premises demanded, and the return made and recorded in the proper offices, as the law directs.

William C. Bradley, for the defendants, objected to the evidence offered by the plaintiff, on two grounds. First, for that the judgment recited in the execution, purports to have been rendered at June term, 1810; to support which a record is produced, of a judgment rendered at June term 1807. Secondly, for that the execution issued on two distinct judgments, one against Taft, the principal debtor, and one against Barnes the trustee.

The Court admitted the record, reserving the point; the parties consenting to a rule, that, if a verdict should be found for the plaintiff, and the Court should be of opinion that the record was properly admitted, the verdict to stand, but if of opinion that the record ought not to have been admitted, the verdict to be set aside and a non suit entered.

Bradley, then stated as the defence in this action, that Giles Alexander, one of the defendants, had, at a Circuit Court of the United States, holden at Rutland, in, and for the district of Vermont, on the third day of October, 1808, recovered a judgment in an action of ejectment, in his favor against Silas Taft the landlord, and D. Belknap, the tenant, for the premises demanded in the present action. That he prayed out a writ of possession on that judgment, by virtue of which he obtained actual seisin and possession of the premises.

On production of the record in the action of ejectment, it appeared that the writ of ejectment was regularly served on Belknap, the tenant in possession, personally; that service of the writ was made, as to Taft, the landlord, by a copy left at his last and usual place of abode, in Dummerston. That the action was entered at May term of the Circuit Court, 1808, a general appearance was entered for the defendants, and the cause continued to the then next October term of said Court; at which term, judgment was entered by default, and a writ of possession thereon issued, which was never executed otherwise, than by Belknap's delivering the possession of the premises to Giles Alexander, the plaintiff in that ejectment; a minute of such delivery of possession being endorsed on the writ and signed by Belknap.

Everet, for the plaintiff, then stated, and offered to prove that the judgment in favor of Alexander against Taft and Belknap was obtained by collusion, between Alexander the plaintiff, and Belknap, Taft's tenant, in possession. That Taft, the landlord was not at the time a resident within this State, that he had no notice of the pendency of the action of ejectment; that, at the first term of the Court, Belknap had caused a general appearance to be entered for himself and Taft, the landlord, but wholly neglected to give any notice to Taft. And, that at the next term, judgment was rendered,

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as on default, by collusion, between Belknap and Alexander. And insisted, that agreeably to the eighty eigth section of the judiciary act, no title, derived under such a judgment, could avail the defendant, in this action.

Bradley, for the defendants, contended that the evidence offered by the plaintiff, was inadmissible; that the record was conclusive evidence of Taft's appearance, and could not be contradicted by parol; that it fully negatived a want of notice, and, consequently, all collusion.

By the Court. The question submitted, is very important, but the Court think it very clear.—The eighty eighth section of the Judiciary act, which points out the mode of prosecuting actions of ejectment, among other things, provides, "That the action shall, in all cases be brought as well against the landlord, or landlords, if any there be, as against the tenant or tenants in possession of the premises demanded; and, if any such action be otherwise brought, the same shall on motion be abated. And, the judgment rendered in such action shall, while remaining in force, be conclusive against the defendant or defendants, their heirs and assigns." And, as it was foreseen that great frauds might be practised by collusion between the plaintiff in ejectment, and the tenant in possession in the absence of the landlord, the following just and necessary provision was introduced. "And if the plaintiff or plaintiffs shall neglect to join the landlord or landlords in such action, or shall, by collusion with the tenant or tenants recover judgment against him, her, or them, for the seisin of any lands tenements or hereditaments, such landlord or landlords shall not be prejudiced thereby, but shall, in any trial thereafter to be had of his, her, or their right to such lands, tenements or hereditaments, against the person or persons, so recovering as aforesaid, or any one holding, or deriving claim from or under him, her or them, be taken and holden to have the prior possession." This is a remedial provision, and that against fraud: it is a case, in which the Court ought to give a liberal construction, and go to the utmost extent of legal rules in the examination. The judgment does not stand in the way, if collusion be proved; and certainly an entry of an appearance of the landlord in the case cannot. Had there, indeed, been an entry, that the land-

lord personally appeared and confessed judgment against himself, for the demanded premises, it would have been conclusive. But, we know that an appearance, in almost every cause, in which an appearance is entered, is entered by an attorney, and that without actual warrant from the party, our law and practice not requiring such warrant. And we know also, that attornies may be, and often are imposed upon, and induced to enter an appearance without the knowledge of the party, for whom they appear. In a case like this, no attorney with us, would hesitate, at the request of the tenant, to enter an appearance, as well for the landlord, as for the tenant. To procure such entry might be the first act in the fraudulent drama. The question is not, whether it is admissible to prove that there was no appearance entered, to admit such proof would be to contradict the record; but the question is, can proof be admitted to shew who procured the entry to be made, whether it was, or was not done, by the order or with the knowledge of the landlord, or of the tenant only, and such proof clearly is admissible. But were it not, and the record of the entry be considered as conclusive evidence of the landlord's actual appearance, at the first term, yet it would not be conclusive against all collusion; but it would still be competent for him, to prove that the plaintiff in the action of ejectment, by colluding with the tenant procured the judgment to be entered by default. And not only the landlord but any other person holding under, or deriving title from him, may avail himself of the same proof. The evidence offered by the plaintiff is therefore admitted.

The plaintiff by Belknap, the tenant, fully proved the collusion, as before stated,

The defendant Alexander, then attempted to prove a prior title in himself, derived from another source, but failing to do so, a verdict was taken for the plaintiff, subject to the opinion of the Court, on the case reserved.

Afterwards the case reserved, coming on to be heard,

Field, for the plaintiff, contended, that the judgment and execution against Taft, were regular, and with the doings thereon sufficient to support the plaintiff's title in this action. That the judgment against Taft at June term, 1807, was but inchoate, and was not perfected until June term 1810, when the additional costs were tax-

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ed, it was, therefore, well recited in the execution as of that term. That in every case, where money was found in the hands of the trustee, but not enough to satisfy the whole judgment against the principal debtor, it was regular, and was the constant practice in the County Court of that County, to issue, as in the present case, one execution only against the principal debtor and trustee, designating the sum to be collected of each. But when the disclosure was, of property subject to sale, it was the practice of the Court to issue, first, an execution against the property in the hands of the trustee, and, if on being sold, the property proved insufficient, then to issue an execution against the principal debtor for the balance; and he insisted that the practice was correct, and if not, that it was but an error, not an irregularity.

Charles Marsh and *Bradley*, for the defendants. The execution, as against Taft, is not merely erroneous, but irregular and void—it is wholly without foundation, having no judgment to support it: and it is necessary for the plaintiff, to support his title, in this case, to shew, not only, a regular execution, but a regular judgment, on which the execution issued. The execution purports to have issued on a judgment rendered, at June term 1810, but, there appears of record no such judgment, at that term. There does, indeed, appear a judgment, rendered at June term, 1807, between the same parties, and for the same sum, in damages, but for a different amount of costs; this cannot support an execution purporting to have issued on a judgment, at a different term—it may be considered a mistake, but it is a fatal mistake; every one takes judgment, and takes out process upon his judgment at his own risque.

But, on another ground, the execution is still more obviously irregular. The judgment against the principal debtor, and the judgment against the trustee, are two separate and distinct judgments; as much so as two judgments, in favor of the same plaintiff, but against two several defendants, in two several actions, and they can no more be joined in the same execution, in the one case than in the other, The mode pursued, in this case, is not only novel, but absurd, and were there no other objection against the plaintiff's title, this alone would be fatal.

The opinion of the Court was delivered by

CHIPMAN, Ch. J. There appears to have been too little atten-

tion paid to the regular mode of proceeding, in the case of Rider, the present plaintiff against Taft and the trustee Barnes, in the County Court. The mode of proceeding, pointed out in the trustee act, is very plain: the statute provides, that unless it shall appear that personal notice has been given, both to the trustee and principal debtor, the cause shall be continued; and before the plaintiff can obtain judgment against the principal debtor, notice must be given, in the same manner, as is provided in the fifty fifth section of the judiciary act. If the person cited as trustee, has been served with personal notice, he is bound to appear at the first term, to be examined, or make a sufficient excuse for his not appearing in person. If he shall appear at the first term, or at a subsequent term, to which the cause shall have been continued, he is to disclose, on oath, whether he have in his possession, any money, goods, chattels, rights or credits of the principal debtor, and to what amount. And, if it be found that such trustee had in his possession, at the time he was served with the process, money, goods, &c of the principal debtor, it is to be entered of record, and he is made liable therefor, to the amount of the judgment to be obtained against the principal debtor, if there be so much in his possession. On such finding, the plaintiff may proceed to obtain judgment against the principal debtor, under the fifty fifth section of the judiciary act, before mentioned; but can have no further process against the trustee, until such judgment be obtained. If no money, goods, &c. are found in the possession of the person cited as a trustee, he shall not be adjudged a trustee; and, unless it shall appear, that the principal debtor shall have been personally served with notice of the process, or shall have actually appeared in the suit, no further proceedings shall be had upon the process. If property be found in the possession of the trustee, no execution can issue against him, until judgment shall have been obtained against the principal debtor. If the goods and chattels found in the possession of the trustee, are such as are liable to be sold on execution, the execution shall first issue against such goods and chattels, in the possession of the trustee; and if the officer, having such execution shall return, that the trustee refused to expose such goods and chattels, or to pay the amount, the creditor may have a rule of Court on the trustee, to shew cause why the creditor should not have an execution against such trustee, his goods and estate; and. no just cause being shewn,

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the creditor shall have execution accordingly. In all other cases, where the trustee is found to have in his hands money, of the principal debtor, or some debt or demand which he is holden to satisfy in money only, execution is to issue, in the first instance against the trustee his goods and estate. If there be sufficient found in the hands of the trustee, after deducting the costs, which shall be allowed him by the Court, to satisfy the judgment against the principal debtor, no execution is to issue against him, if not, execution is to issue against him for the balance. There are other provisions in the act, but I have recited all those which have any bearing on the case before the Court.

In this case, two objections have been made to the admission of the record, in support of the plaintiff's title.

1. That the execution through which the plaintiff attempts to derive his title, has no judgment to support it. The execution recites a judgment of June term, 1810; but the record is of a judgment, entered up, June term, 1807. The Court consider this an irregularity; there is no record to support the execution, as issued. It cannot be admitted, that the taxation of additional costs, and the award of execution, at June term, 1810, which were incidents in the suit, had the effect to bring forward, and fix, as of that term, a judgment which had been fully made up and entered of record, at a former term. In a trustee suit, execution is sometimes necessarily awarded at a term subsequent to that, at which the judgment was entered up against the principal debtor, but the execution must recite the judgment, as of the term when it was entered up.

The 2d objection is, that the execution includes two separate and distinct judgments, one against Taft, the principal debtor, and one against Barnes, the trustee. The Court think this is also a fatal irregularity, as is very apparent from the explanation which has been given of the proceedings under the trustee act. The judgment against the principal debtor, and the judgment against the trustee, are distinct and separate judgments, to all intents and purposes, and can no more be joined in the same writ of execution, than separate judgments in favor of the same plaintiff, against several defendants in different suits.

In examining the record we find another fatal irregularity, which has not been adverted to by the counsel on either side. It appears that the principal debtor had absconded, and did not reside in this

state, either at the time the suit was commenced, or at any time while it was pending in Court, that he had no personal notice of the suit, and that he did not appear; yet, judgment was taken against him, by default, at the first term of the Court, contrary to the express provisions of the statute. This renders the judgment, as perfect a nullity, as though it had been rendered without any antecedent process. It follows, that all the proceedings, had under that judgment are void, and that the plaintiff could not, thereby, acquire any title to the premises demanded. Let the verdict be set aside and a non suit entered.

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Taft *vs.* Howard.

It is the office of an innuendo, in a declaration to explain what is before alledged, not to introduce any new matter; and, if the matter before alledged be insufficient, it cannot be aided by an innuendo.

THIS was an action for words. The declaration, after the usual introduction, but without any colloqium, procedes. "The defendant did, on the 15th day of June, 1813, at Townsend aforesaid, with a loud voice, speak, utter and publish the following false, scandalous and malicious words, of, and concerning the plaintiff, to wit: I have come to see you (meaning the said Amasa) about burning my bark house, (meaning the bark house of the defendant and others, which had then lately been burnt, standing a little eastward from Marsh's store, and Charles Phelp's office in said Townsend) I want that you (meaning the plaintiff) should give me(meaning the defendant) some satisfaction respecting the matter, (meaning the burning of the bark house aforesaid.) I do not think you would have done it, (meaning, have burnt the bark house) if you had not been influenced by your father and grandfather. Upon which the plaintiff said, that he knew nothing about the matter. Then the defendant, proceeded, and, with a loud voice, did utter and publish the following false, scandalous and malicious words, to wit: I know more about the matter (meaning the burning of the bark house aforesaid) than you (meaning the plaintiff) think for. I know that you (meaning the plaintiff) set it on fire, and you (meaning the plain-

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tiff) had better own the matter; you can settle it easier than when it is proved.

To this declaration there was a demurrer and joinder.

Field and *Charles Phelps*, in support of the demurrer. The words as set forth in the declaration are not actionable. No colloquium is introduced, concerning any building before that time, burnt. The innuendo in the first part of the declaration, in these words, "meaning the bark house of the defendant and others," which had then lately been burnt, cannot be taken to supply the place of a colloquium, nor can it, in any way, help the matter, as there is nothing going before to which it refers, for explanation, as is the office of an innuendo.

Elliot, for the plaintiff. The words set forth in the declaration, are in themselves actionable; but, if not, the declaration may be taken as containing two sets of words, or, rather two counts; then the innuendo in the first count is in the nature of a colloquium, of, and concerning a certain bark house, which had, then lately been burnt; and the innuendoes in the second count, refering to the first, so fixes the meaning, as clearly to render the words in the second count actionable, if not otherwise so.

By the Court. The words as set forth in the declaration are not actionable. Had there been a colloquium introduced, of and concerning a certain building, called a bark house, belonging to said Chapin Howard and others, and which had then lately been burnt, and was supposed to have been set on fire by some evil disposed person; the words laid in the declaration might, with proper innuendoes, refering to the colloquium, have been held actionable. But it is the office of an innuendo to explain, by refering to something already introduced, not to introduce new matter. The innuendo, relied upon by the plaintiff's counsel, in what he calls the first set of words, is introductory of new matter. There is no colloquium, no facts stated to which it can refer. The matter in what is called the first set of words is insufficient, and a reference, in what is called the second set of words to this insufficient matter, cannot avail; and as no special damages are laid, the declaration cannot be supported, there must therefore be

Judgment for the defendant.

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ALLEN *vs.* FISHER, and others.

To an action on a gaol bond, nothing can be pleaded, which might have been pleaded to the original action, or which existed previous to the rendition of judgment.

THIS was an action on a gaol bond, taken by the Sheriff of Windham County, for the liberties of the prison granted to Fisher and Haviland, two of the defendants, who had been committed on an execution, in favor of Esther Allen, the plaintiff, on which occasion Fisher and Haviland, as principals, and the other defendants, as sureties, executed the bond on which the action was brought. Fisher and Haviland escaped, and the Sheriff, thereupon, assigned the bond to Allen the creditor.

To the declaration, which is in the common form, the defendants pleaded, that the plaintiff ought not to have or mantain her said action thereof against them the defendants, for that, after the service of the original process, and before the rendition of judgment, on which the execution issued for the said sum of $107,46 damages, and $7,59 costs, and on which the said Fisher and Haviland were committed in manner aforesaid; the said Fisher for himself, and the said Haviland, did pay unto the said Esther Allen, the plaintiff, to her complete satisfaction, the full value of the note, for the recovery of which the said process was commenced. On which the said Esther Allen, the said note not being then in her possession, did promise to deliver the said note to the said Haviland, or discharge the same. And the said Fisher and Haviland, placing full confidence in the promise and undertaking of her the said Esther, as aforesaid, did not attend further to defend said action, so commenced on said note; and the judgment aforesaid for the sum of $107,46 damages, and $7,59 costs, was rendered on said note against the said Fisher and Haviland, by default, in manner aforesaid, contrary to the express agreement of the said Esther, after the said note had been paid, and satisfied.

To which plea, there was a demurrer and joinder.

By the Court. It is unnecessary to hear arguments in this case. The plea cannot be supported, either on principle or by precedent; it is clearly bad both in form and substance. There is a total want of precision in setting forth the facts, and the matter is wholly irre-

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levant, and inadmissible. It can never be permitted to a defendant, after judgment, even on a *scirefacias* to revive the judgment, to plead in his defence, any matter which might have been pleaded to the original action, or which existed previous to the rendition of the judgment, though a Court of equity will in some cases grant relief.

It may be collected from this plea, that Fisher and Haviland were sued by the plaintiff, on a note which she held against them, for what sum is not stated; that after the service of the writ, and probably before the return, they paid the money, or, as it is stated, the full value of the note, to her complete satisfaction; the plea does not state what sum was due—what sum was paid, or in what the payment was made; but that, on receiving payment, the plaintiff promised to deliver up the note, which was not then present, or discharge the same. That, in consequence of this promise, they did not appear to defend in the suit, and judgment, was thereupon obtained on default. If this be true, the defendant might by a proper plea have had a partial relief in this action. If they actually paid any thing to the plaintiff, as alledged, which she had not accounted for, she is still indebted to Fisher and Haviland for the amount, and the defendants might have pleaded it in off-set, in this action. It has been settled in this Court, that, in an action by a creditor against principal and sureties, the defendants may set-off any sum due from the plaintiff to the principal which he might have set-off had the suit been against the principal solely. It was so settled by this Court, on a full examination of principles and authorities, in the case of Brundridge *v.* Whitcomb and others, (ante page 180.) That was, like the present case, an action on a gaol bond, by the creditor, assignee of the Sheriff, against the principal and his surety. The principal was allowed to set off a sum due to him from the plaintiff before the commencement of the action; it might have been so done in this case, if the facts stated be true, but this matter cannnot be pleaded in bar.

Judgment for the plaintiff.

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WHITMORE *vs.* RIDER.

If a report of referees be set aside by the County Court, no advantage can be taken of such report, in any subsequent trial of the cause, either in the County, or Supreme Court.

Whether a report of Referees, ought to be accepted or set aside, is a question wholly in the legal discretion of the Court, to which it is made, and cannot be reversed by writ of error, or otherwise.

THIS was an action of *assumpsit*, originally commenced before the County Court. By a rule of that Court, the cause was, by consent of parties referred to R. Hatch, J. Dorr and N. Gere. At the time appointed for the reference, N. Gere, one of the Referees, was absent, and the parties, by an agreement in writing, substituted William Wait in the place of N. Gere. Reuben Hatch, J. Dorr and W. Wait, proceeded to hear the parties, on the 13th day of February, 1813, and made a report to the next March term of the County Court, in favor of the defendant. On motion of the plaintiff's Counsel, the Court set aside the report, principally, on the ground that, such substitution of a person as referee, in the place of a referee, appointed by the Court, was not binding upon the parties. Whereupon T. Hutchinson, counsel for the defendant filed a bill of exceptions, which was signed by the judges, and came up with the record. After the bill of exceptions was filed, the cause was continued to the next Sept. term of the said Court; at which term the defendant pleaded (as after the last continuance) the report of the Referees, which had been set aside, as an award of arbitrators on a parol submission of the parties. To which plea, C. Marsh, Counsel for the plaintiff, replied, setting forth the rule of reference as before stated, the substitution of W. Wait, as a referee, in the place of N. Gere, the report of the Referees, and that the report was set aside by the Court: and averred that this was the same submission and award set forth in the plea.

To this replication there was a demurrer and joinder; and the County Court rendered judgment for the defendant; from which judgment the plaintiff entered an appeal to this Court.

And now Hutchinson for the defendant, moved this Court to accept the aforesaid report of the referees, made to the County Court, on the ground, that the facts stated in the bill of exceptions, and appearing on the record, warranted such acceptance, and a judgment on the report in favor of the defendant.

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By the Court. There can be no foundation for the motion: the filing of the bill of exceptions, in this case, is a strange irregularity. Whether a report of referees ought to be accepted or set aside, is a question wholly in the legal discretion of the Court to which it is made; and it is not examinable elsewhere in any shape. As well might the decision of a Court in granting or refusing a new trial be re-examined in another Court.

But, in this case, the defendant, had, after the bill of exceptions was filed, pleaded to the action; an issue of law was joined, and the County Court rendered judgment thereon in favor of the defendant; the bill of exceptions was abandoned, and the cause stands for trial before this Court, on the pleadings closed in the County Court, and on which that Court rendered judgment.

The defendant takes nothing by this motion.

The pleadings were afterwards withdrawn, by consent of parties and the general issue pleaded.

ENOS *vs.* BROWN.

In a case where personal property is attached on mesne process, if execution be taken out and delivered to the same officer, who served the attachment, within thirty days from the time final judgment was rendered in the suit, it is a taking of the property, in execution within the meaning of the 33d section of the judiciary act; and the property is not discharged from the attachment, although the execution be not actually levied upon the property within thirty days.

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THIS was a writ of error brought to this Court, to reverse a judgment, rendered by the County Court, for the County of Windsor, in an action on the case, brought before that Court by Pascal P. Enos, the plaintiff in error, against Israel P. Brown, the defendant in error. The record of which judgment brought into this Court, is as follows:

"Israel P. Brown of Plymouth, in the County of Windsor is attached to answer to Pascal P. Enos of Woodstock, in the said County of Windsor, Sheriff of said County, in a plea of the case for that at Plymouth, on the 17th day of June, 1811, the plaintiff was Sheriff of said County, and had in his hands a writ of attachment, to him

directed, in favor of Seth Hodges of Pomfret, in said County, against Asa Wheeler and Daniel Brown, both of said Plymouth, which writ was dated the day and year last aforesaid, and made returnable before the County Court for the County of Windsor, on the third Monday of September then next. And the plaintiff, Sheriff as aforesaid, by virtue of said writ, attached two bay coloured horses, of the value of one hundred dollars; and one black cow, of the value of sixteen dollars; and one two-horse waggon, of the value of forty dollars, as the property of said Daniel Brown, and gave notice to the said Daniel, as the law directs, and returned the said writ to the said Court, to which it was made returnable, with a return of his doings thereon endorsed. And the plaintiff on the same seventeenth day of June aforesaid, at the request of the said Israel P. Brown, delivered to him the said horses, cow and waggon, so attached, as aforesaid, for safe keeping, during the pendency of the suit aforesaid; and in consideration thereof, the said Israel P. Brown, by his receipt in writing of that date, acknowledged the receipt of the said horses, cow and waggon, and promised to deliver the same when demanded. And such proceedings were had by the said Hodges, in his said suit, that, at the March term of said Court, in the present year 1812, he recovered a regular judgment against the said Daniel, in his suit aforesaid, for the sum of $276,39 damages, and $10,21, costs of suit. And, within thirty days after the rendition of said judgment, the said Hodges demanded of the said Enos, the said horses, cow and waggon, for the purpose of levying thereon his said execution, which he had then prayed out on said judgment, and put into the hands of the said Enos, to collect. And the plaintiff afterwards, to wit: on the 29th day of April last past, then having the said execution in his hands, in full life, did demand of the defendant, to deliver to him the said horses, cow and waggon; yet the defendant refused, &c."

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And now the parties appear here in Court, and the defendant, by his attorney C. Marsh, defends, pleads and says, that he did not assume and promise in manner and form as the plaintiff in his declaration hath alledged, and thereof puts himself on the country for trial; and the plaintiff by his attorney, T. Hutchinson doth the like. The record, after reciting the empannelling of the jury proceeds—" And the said Enos, then and there proved to the jury all the facts set forth in his said declaration; and proved that the said

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horses, cow and waggon, were demanded of him the plaintiff, by the said Hodges within thirty days from the rendition of said judgment, for the purpose of levying said execution thereon; and that the said execution was at the same time, delivered by the said Hodges to the said Enos, being then Sheriff as aforesaid, with directions for him to levy the same on said horses, cow and waggon. And that after the expiration of thirty days, and within sixty days after the rendition of said judgment, having said execution in full life, he the said Enos demanded the same property of the said Israel P. Brown, for the purpose of levying said execution thereon.

And the counsel for the said Israel P. Brown did then and there object, and insist before the said Court and jury, that in point of law, the plaintiff ought not to recover, because he did not make a demand of the said property, of him the defendant, within thirty days from the rendition of said judgment.

And the counsel for the said Enos, did then and there, insist, before the said Court and jury, that as said Hodges had demanded said property of said Enos, and delivered to him, then Sheriff as aforesaid, the said execution, within thirty days from the rendition of said judgment, for him to levy the same on said property, the said property was holden to satisfy said execution. And the said Enos was holden to produce the same, for the purpose of satisfying said execution; and that it was not necessary for the said Enos, to demand said property within thirty days from the rendition of said judgment.

And the Chief Judge of the Court, did then and there give in charge to the Jury, that it was necessary in point of law, for the said Enos to have demanded, the said property of the defendant, Israel P. Brown, within thirty days from the rendition of said judgment, in order to recover upon said receipt: and, with that charge, submitted the cause to the consideration and decision of the jury, who returned their verdict into Court, that said defendant, did not assume and promise in manner and form, as the plaintiff had in his decleration alledged, and found for the defendant his costs. The bill of exceptions concluded in the usual form and was allowed and signed by the judges."

The plaintiff assigned for error the misdirection of the judge in his charge to the jury.

The defendant pleaded in *nullo est erratum*.

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T. Hutchinson, for the plaintiff. Where goods and chattles are attached on mesne process, and delivered on a receipt to a third person, they remain in the custody of the law, and are, to all legal purposes still in the custody of the officer, who served the attachment, who is alone responsible to the creditor, that the property shall be forthcoming to satisfy his execution, when obtained. On delivery of the execution to the officer in due time, the property attached is instantly in execution, without any formal act of the officer. The receiptor cannot excuse himself, for not delivering it if properly demanded, at any time within the life of the execution; proof, therefore, of a demand on the receiptor, within that time, although after the expiration of the thirty days from the rendition of the judgment, is sufficient to charge him. The opinion of the judge as given to the jury in his charge, was, therefore clearly erroneous.

C. Marsh, for the defendant. To continue the lien of the creditor on goods and chattles attached on mesne process, not only must the execution be put into the hands of a proper officer within thirty days from the rendition of final judgment in the suit, but the property must be actually taken in execution within the thirty days. The delivery of the property, in such case to a receiptor, is for the benefit of the debtor, and it is supposed to go into his hands. But if the property remain in the hands of the receiptor, if the execution be not actually levied upon it within the time prescribed by law, and the debtor call for it, as being discharged from the attachment, the receiptor must deliver it to him, or he will render himself liable to an action. If he deliver ti to the debtor, according to the doctrine advanced by the plaintiff's counsel, he will be liable to the officer. At any rate, he cannot be held liable in such case, unless he has had notice of the execution, which does not appear in this case. It is made necessary by the 33d section of the judiciary act, that goods attached, be actually taken in execution, within the thirty days, if not so taken they are discharged from the attachment. The words of the act are, "That when the goods or chattels of any person shall be taken on mesne process, the same shall be holden thirty days from the time that final judgment shall be rendered in the suit; and unless the plaintiff in such suit, shall, within the term of thirty days, from the time of rendering such judgment, as

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aforesaid take such property in execution, the same shall be discharged from such process; and shall be no farther liable to answer such judgment, than though the same had not been attached." If then there be not an actual formal taking of the property in execution, it will be discharged, whether in the hands of the officer or receiptor. The opinion of the Court below, was, therefore correct, that, the property, not having been taken on the execution, or demanded of the receiptor, within thirty days from the rendition of the judgment, was discharged from the attachment. The receiptor was no longer holden to keep the property, or to deliver it for the purpose of satisfying the execution; but it belonged to the debtor free and clear from all the consequences of the attachment. If any question remains between the attaching creditor and the officer, it can neither affect the owner or receiptor of the property. And, as the officer had delivered the property on receipt, and had taken an express promise for the re-delivery of it on demand, he had parted with the custody of it and relied on the promise, there can be no colour for saying, that the delivery of the execution, to him by the creditor, was either an actual or virtual taking of the property in execution.

CHIPMAN, Ch. J. delivered the opinion of the Court.

In this case the writ of execution was delivered to the same officer who served the attachment; and the question is, whether the delivery of the execution, to such officer, is a taking of the property in execution, within the true intent and meaning of the 33d section of the judiciary act. The clause in this section "unless the plaintiff in such suit, shall within the term of thirty days from the time of rendering such judgment as aforesaid, take such property in execution, the same shall be discharged &c," is clearly not to be construed literally, for the creditor cannot personally take the property in execution; but, the true construction is, shall cause such property to be charged in execution by a proper officer. Personal property, attached on mesne process is considered as in the custody of the law, in the keeping of the officer who served the attachment, for the purpose of satisfying the execution, which may be obtained in the suit, and is on the delivery of the writ of execution to him, by that very act, charged, or taken in execution. In this case, the creditor, within thirty days from the rendition of the

judgment, delivered the execution to the same officer who served the attachment, and who had the legal custody of the property. The officer, then, in the true sense of the law had the property in execution, and he had until the return day of the execution, to levy the money of that property. He is not bound, in such case to proceed immediately, but with due diligence, for which he is accountable to the creditor only.

The case is analogous, to that of a person in gaol on mesne process. By the 39th section of the judicary act it is provided, "that when any person shall be attached on mesne process, and shall be committed, agreeably to the provision of this act, and shall be in gaol, at the time final judgment shall be rendered against him, he shall be discharged from confinement, unless the plaintiff in such action, within fifteen days after rendering of final judgment as aforesaid, shall charge him with execution." Now, in this case, the debtor being in gaol, a prisoner in the custody of the Sheriff, a delivery of the execution to the Sheriff, is charging such prisoner in execution. It would be so, if the debtor were in gaol, in the custody of the Sheriff on process in favor of a third person, and not on process in favor of the plaintiff. This is a clear, and well settled doctrine of the common law. And, from the common law we are to ascertain what the legislature meant by charging a debtor with execution. It is true, that the attachment of property, as authorized by our statute, was unknown to the common law; but, being introduced by statute, it comes within the analogy, the principles and reasons are the same, and the analogy holds good in most of the cases, which can be put. But if the debtor be in gaol, in the custody of the Sheriff, and the creditor deliver his execution to a constable, who has no connection with the Sheriff, and has not the custody of the debtor, such delivery of the execution to the constable, will not charge the debtor in execution. The creditor must, in such case, at his peril, see that the constable charge the debtor in execution, by delivering to the keeper of the gaol a copy of the execution, with his return of the commitment thereon indorsed, within the fifteen days. So if the attachment of personal property on mesne process was made by the Sheriff, and the plaintiff deliver his execution to a constable, he does not thereby, charge the property in execution. He must see that the execution be levied thereon, within thirty days, or a demand be made of the Sheriff, to

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charge him in case the property has been eloigned. The same steps must be taken if the officer, who served the attachment shall be out of office. On the point now in question, the analogy is full and clear. If the Sheriff keep the gaol by deputy as he may, and usually does, the deputy has the immediate custody of the prisoner, yet if the execution be delivered to the Sheriff, the prisoner is charged in execution the same as though he was in the immediate keeping of the Sheriff. So, although, the officer, who serves an attachment on mesne process, deliver the property attached to some third person, on receipt for safe keeping as he lawfully may, yet the law considers the property in the custody of the officer; and on the delivery of the execution to him, the property is immediately charged, or, to use the words of the Statute, is taken in execution. If the third person receiving the property for safe keeping, suffer it to be eloigned, the officer alone is accountable to the attaching creditor. In both cases, the officer has his remedy over against his substitute in case of delinquency. The gaoler as to the detention, or discharge of the prisoner, is under the direction and control of the Sheriff; so is the person, who receives property for safe keeping which the Sheriff has attached.

As to the objection suggested by the defendant's counsel, that the promise contained in the receipt, shews that the custody of the property was changed, and that the officer relied solely on the promise, it is a sufficient answer, that the law would have implied the same promise, had no such promise been inserted in the receipt. It was never thought, that an express promise or a bond of indemnity to bail, took away their right to the custody of the principal, or to deliver him up in discharge of themselves. The Court are clearly of opinion, that the exceptions to the opinion of the County Court are well founded, that the judgment is erroneous and must be reversed.

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RALSTON *vs.* STRONG.

A writ of replevin provided for by the 42d section of the judiciary act, must be directed to the Sheriff of the County or his deputy, and if such writ be directed to a constable, it is void, and no one can justify under it.

A declaration defective in point of form, may be aided by the plea, but is not aided by the plea, if defective in matter of substance, unless the matter omitted in the declaration, be admitted by the plea.

THIS was an action on the case, brought by the plaintiff, Ralston against William Strong, formerly Sheriff of Windsor County. The declaration set forth, that the plaintiff, Alexander Ralston, on the 15th day of November, 1810, prayed out a writ of attachment in his favor against —— Gove of Montpelier, in the County of Washington, returnable to the County Court, holden at Woodstock, in, and for the County of Windsor, in March, 1811. And delivered the same writ to the said William Strong, then Sheriff of said County of Windsor, to serve and return according to law. "That on the same 15th day of November, 1810, the said William Strong, so being Sheriff, as aforesaid, made return of said writ, that he had attached thereon the following goods, turned out to him by the plaintiff, to wit: (describing the goods) all which appears by the return of said Strong. And such proceedings were had, that, at the September term of said County Court, 1812, the plaintiff recovered judgment against the said Gove for the sum of $58,30 damages, and $22,52 costs of suit. And on the 29th day of September, 1812, the plaintiff took out a writ of execution on said judgment, signed by Benjamin Swan, Clerk of said Court, dated the day and year last aforesaid, and directed to the Sheriff of the County of Windsor &c. And the said writ of execution was, within thirty days from the rendition of said judgment, put into the hands of Pascal P. Enos, then Sheriff of said County of Windsor, to be by him levied, collected and returned according to law. And on the 27th day of November, 1812, the said Pascal P. Enos, as Sheriff as aforesaid, made his return on said execution, that he had made diligent search for the body and property, of the said Gove, whereon to levy the said execution, and could not find the same; and that he had demanded of said Strong the property aforesaid, which was attached on the original writ, and that the said Strong neglected and refused to turn out said property."

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The defendant pleaded in bar, "That the said Alexander Ralston, from having and maintaining his said action thereof against him the defendant ought to be barred, because he says, that after the attachment of said goods and chattels described in the plaintiff's declaration, and while the same were in the custody of the said William Strong, to wit, on the 27th day of November, 1810, the said Gove prayed out his writ of replevin, in due form of law, bearing date the same day and year last aforesaid, and signed by Benjamin Swan, Clerk of the County Court, for said County of Windsor, and directed to either constable of Bethel in said County of Windsor; and describing said goods and chattels, so attached, as the plaintiff in his said writ has set forth, and reciting that the same had been attached at the suit of the said Alexander Ralston, and commanding him, that if the said Gove, should execute a bond to the said Ralston, in the penal sum of $200, with sufficient surety or sureties, conditioned according to the form prescribed by law, to cause said goods and chattels, so attached as aforesaid to be replevied, and deliver the same to the said Gove; and to make return of said writ, together with the bond executed, as aforesaid, to the same Court to which the said writ of attachment was made returnable, to wit, to the County Court then next to be holden at Woodstock, within and for the County of Windsor, on the third Monday of March, then next. And the said Gove at Bethel aforesaid, delivered the said writ of replevin, to Daniel Lilley, a constable of said Bethel, for him to serve and return according to law, and the precept therein contained." The plea then proceeds to state, that the constable received the said writ of replevin, that said Gove executed a bond to the plaintiff, Ralston, in the penal sum of $ 200, with a good and sufficient surety, according to the precept of said writ, with a condition annexed as required by law, which condition is set forth at large. And that the constable replevied the goods, then in the possession of Strong, the Sheriff, the now defendant, and delivered them to said Gove, and returned the writ and bond, as directed.

To this plea there was a demurrer and joinder.

C. Marsh, for the plaintiff. The plea in bar, in this case is wholly insufficient. Had the defendant stated in his plea, that the property which had been attached at the plaintiff's suit, and which

the law had placed in his custody for the purpose of satisfying the judgment, which should be recovered in that suit, had been legally taken out of his custody, it would have been a good discharge against the plaintiff's demand. But the writ of replevin was not legally issued or legally executed, having been directed to a Constable, and by him served—an officer not authorised by law to serve writs of replevin. This kind of replevin is given by statute, to enable a debtor whose property has been attached on mesne process, to repossess himself of the property, by giving good and sufficient security to the creditor. This special process is given by the 46th Section of the Judiciary Act, which requires that the writ of replevin in such case shall be directed to the Sheriff or his deputy. And, as the law giving the process requires that it be directed to the Sheriff or his deputy; and, as no officer can serve a process, unless it be directed to him, it is the same as though it had been enacted that this particular process shall not be directed to a Constable, and that a Constable shall not have power to serve it. And this was done with good reason; for the officer serving the writ of replevin is required to take a bond to the attaching creditor, with good and sufficient sureties, of which he is made the judge, and for whose sufficiency he is made responsible, conditioned that the debtor, the defendant in the original action, shall return the property, or satisfy the judgment which may be recovered against him. It was intended to give to the creditor the responsibility of the Sheriff of the County, which is well known, and his security ample; and that he should not be compelled to rely on the responsibility of a town Constable, which, whatever it may be, is very little known.

If the writ could not be directed to the Constable, he could not be legally authorised to make replevin; consequently, as the defendant suffered the property to be taken out of his custody in the manner stated in his plea, without any authority of law, it cannot discharge his liability to the plaintiff for the property.

T. Hutchinson for the defendant. It is immaterial to enquire whether a Constable be or be not authorised by the 46th Section of the Judiciary Act to serve writs of replevin, for a Constable is expressly authorised to serve such writ by the 9th Section of the Act regulating the office and duty of Sheriff, which is in the following words—"And all Constables, within their respective towns, shall

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have the same powers as are given to the Sheriffs—be under the same liabilities, and be subject to the same penalties, as Sheriffs in their respective Counties." The law which gives to the Sheriff power to serve a writ of replevin, gives by this Section, the same power to every Constable within his town; and if the Constable may legally serve such writ, it may be legally directed to him.

But if the defendant's plea be defective, still he is entitled to judgment for the insufficiency of the declaration. The original writ of attachment is sufficiently set forth in the declaration; but it is not averred that the property was attached on that writ, it is merely averred that the officer made return that he had attached the property by virtue of the writ. And there is no averment that any demand was made on the officer, the present defendant to produce the property: it is only stated that the officer having the execution, had made return that he had demanded the property of the present defendant, and that he neglected and refused to deliver it. Nor does it appear by the declaration that the execution was taken out within thirty days after the rendition of the judgment.

C. Marsh in reply. If there were any defect in the declaration, as argued by the defendant's counsel, it is cured by the defendant's plea, which expressly admits, that the property was taken on the attachment, and, by implication, that the execution was taken out within thirty days after the rendition of the judgment, and a regular demand made upon the defendant to produce the property.

CHIPMAN Ch. J. delivered the opinion of the Court.

After a full consideration of this case, the Court find little difficulty in making a decision. Whether the plea in bar be sufficient, depends on the question, whether the writ of replevin was legally directed to the Constable, or, whether a Constable is authorised, by law, to serve such writ of replevin. By the 24th Section of the Judiciary Act, it is, among other things, provided, that every original writ issued in the ordinary mode, (for this section includes ordinary process only) shall be directed to the Sheriff, his deputy, or a Constable of the town, where the service is to be made, and, as before provided, shall be executed by the officer to whom it is directed. It may be directed to the Sheriff or his deputy; for they both, in fact, exercise but one office; without a direction to a Constable: in which case, the officer alone to whom the writ is direct-

ed, can execute it—for, by the 2d Section of the Act regulating the office and duty of Sheriffs, it is declared that the Sheriff shall have full power, within his own County to serve and execute all lawful writs, to him directed, issuing from lawful authority. This is but a declaration of the common law. The Sheriff is a common law officer: without the statute, he would have had power, by virtue of his office, to execute all lawful process to him directed, and no other. But, at common law, the Constable has no power to serve civil process. The power of the Constable to serve civil process, depends on the 9th Section of the Act last mentioned.—"That all Constables shall, within their respective towns, have the same powers, as are given to the Sheriffs, &c." By this Section a Constable within his own town is empowered to serve all lawful writs, process and precepts, directed to him, and issuing from lawful authority. But it is necessary that the writ or process be directed to the Constable, otherwise he has, by the Act, no authority to serve it. The question then is, whether such writ of replevin may lawfully be directed to a Constable to execute: For, if by law it cannot be directed to him, he can have no authority to execute it. This depends on the 46th Section of the Judiciary Act, of which the plaintiff's counsel have given the true construction. The provision therein contained is a special provision made by the Legislature, to remedy an inconvenience arising out of our attachment law. Property taken on attachment is frequently of a perishable nature, and its value to the owner may depend on its present use, or immediate sale; to keep it locked up, to wait the event of a lawsuit, frequently long and tedious, could be of no advantage to the plaintiff, but might endanger his security, and occasion a dead loss to the defendant. This provision enables the defendant, in the mode prescribed, to substitute, in lieu of the property attached, good and sufficient security to the plaintiff. The provision is "That any person authorised to issue attachments, may, on application of such defendant or defendants (whose goods are attached) issue a writ of replevin, in the form prescribed by law, directed to the Sheriff of the County, or his deputy. in which service is to be made. And the Sheriff or his deputy, to whom such writ of replevin is directed, shall, before he serve the same, require the plaintiff or plaintiffs in such replevin, to execute a bond to the plaintiff or plaintiffs in the

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original process, with sufficient surety or sureties, in the sum, to the value of which attachment was directed to be made, which sum it shall be the duty of the authority issuing such replevin truly to insert." Then follows the condition of the bond, which is, in substance, that the plaintiff in replevin, shall return the goods replevied, so that they may be taken on an execution which may be issued on a judgment recovered in the original suit; or, otherwise, satisfy such judgment, within sixty days from the rendition of the same. And the writ of replevin and the bond, are to be returned to the Clerk of the Court to which the writ of attachment was made returnable, to be by him kept on file. If there be a breach of the condition, the plaintiff in the original action is to have his remedy on the bond; and the officer serving the replevin is made responsible for the sufficiency of the principal and sureties.

It is a settled rule, that where a remedy is given, or a mode of proceeding directed by statute, in a new case, the direction of the statute must be strictly pursued. It is not permitted to vary from it on the ground of convenience. This would be, to be wiser than the law. But, in this case, there are strong reasons for adhering strictly to the rule. The Legislature did not intend to lessen the security of the plaintiff at whose suit goods are attached, by providing for the writ of replevin; and as in the process of replevin his interest is concerned, and yet he is not to be consulted, the law has taken special care to intrust the service of the replevin to an officer of public confidence, and known responsibility; and who, from his situation, may well be supposed to be the best judge of the sufficiency of the surety or sureties, that may be offered; and feel more deeply his own liability, and be of greater ability to respond, in case the principal and sureties in the bond should prove insufficient.

The result is, that the writ of replevin in this case, was illegally directed to the Constable, and he had no legal authority to serve it; and the taking of the property from the Sheriff, the present defendant, by colour of the writ of replevin, was an unauthorized act, and ought to have been resisted. It was a tortious act in the Constable, of which the defendant can no more avail himself, than he could of the tortious act of any other person, who might have rescued the property.

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It has been suggested that it would have been improper to have directed the Sheriff to execute the writ upon himself, but it is not so; there could be no impropriety in this. The writ of replevin is not an adverse suit, it is a mere authoritative order to the officer who took the property on the writ of attachment, to deliver it to the defendant in the original suit, on his complying with the condition prescribed by the statute; and certainly, a more proper person could not be found to do this, than the officer who took the property on the attachment and has it in his custody. The plea in bar is therefore wholly insufficient.

But exceptions have been taken by the defendant's counsel to the plaintiff's declaration. And, it is true, that if the plaintiff's declaration be insufficient, he is not entitled to judgment, notwithstanding the plea in bar may be insufficient.

The declaration is certainly very inartificially drawn. It contains no averment that the property had been taken on attachment; but instead of that, it is set forth that the Sheriff, the now defendant, had made return that he had attached the goods which he describes: that is, instead of averring the fact, the evidence is set forth by which the fact might be proved. The declaration then proceeds to state, that such proceedings were had in the suit against Gove, that at the September term of the County Court, 1812, he recovered judgment against Gove, omitting the day on which the Court sat, and the day on which final judgment was rendered.—That on the 29th day of September, 1812, he took out execution, and within thirty days after the rendition of the judgment, put it into the hands of Enos, the then Sheriff, to levy and collect.—That on the 27th day of November, 1812, Enos, the Sheriff, made return that he had made diligent search, and could find neither the body nor estate of Gove; and that he had demanded of the said Strong (the now defendant) the property aforesaid, which had been attached on the original writ, and that the same was not delivered to him.—Here again is the same fault—a statement of the evidence, instead of a statement of the fact; or, perhaps still worse; for I think, on this point, that the Sheriff's return, that he made the demand, could be no evidence against the defendant. But, if we admit the statement made by the Sheriff in his return, that he made a demand, to be equivalent to a direct averment of the fact, it is still insufficient: The time when the demand was made is omitted. It might for

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ought that appears have been on the 29th day of September, on the 27th day of November, or on any day between those two days. It might have been within thirty, or more than sixty days after the rendition of the judgment, for on what day the judgment was rendered does not appear.

Now, it is provided by the statute, that, in all cases, where property has been attached on mesne process, unless the plaintiff take the property attached, in execution, within thirty days after the rendition of the judgment in the action, the property shall be discharged, and no longer holden, any more than though it had never been attached: The plaintiff has lost his lien on the property in whosesoever hands it may be. If the execution be, within the thirty days, delivered to the same officer who served the attachment, and who has the legal custody of it, & is supposed to have it in his possession, the delivery of the execution to such officer, is, as to all the purposes of the plaintiff's right, a taking of the property in execution. But if the execution be delivered to another person, which must be done, if, as in the present case, the person who served the attachment be out of office, the plaintiff must, within the thirty days, cause a demand of the property to be made of the person in whose legal custody it is, for the purpose of taking it in execution, or he will loose his lien on the property, and all right and claim against the officer who made the attachment. As, in this case the execution was not delivered to the same officer who served the attachment, but to another officer, it is necessary, in order to render the defendant liable in this action, to shew that a demand was made on him for the property, within the thirty days; but this does not appear. It may or may not have been done—there is nothing in the declaration from which to make the intendment.

But it is insisted that these defects in the declaration are cured by the plea in bar. It is true that a plea may, by a direct admission of facts omitted or obscurely expressed, aid the declaration; it may, by intendment, aid that which is defectively set forth, but will not, by intendment, aid an omission of that which is the very gist and point of the plaintiff's action. Thus, in the present case, I think the first defect mentioned, the want of an averment in the declaration that the property was attached on mesne process, is cured by the express admission in the plea, and would perhaps be aided by

implication, from the nature of the plea without such express admission; but the other defects are not cured by any such admission, either express or implied. There is no ground to say, in this case, that the defendant's plea admits that a demand was ever made on him, to produce the property to be taken in execution, much less that such demand was made in time.

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This declaration was probably drawn by some Clerk in the office, inexperienced in pleading. It is very wrong to incumber the records with such crude drafts; pleading should be intrusted to men of science only. Let there be

Judgment for the defendant for the insufficiency of the declaration.

State *vs.* Ravelin.

RAVELIN was indicted for uttering and passing a false, forged and counterfeit bank bill, purporting to be a bill of the Manhattan Bank of the State of New-York. On the trial of this case the Court held, that a person who had frequently dealt with the Bank, and who said he had, by that means, become acquainted with the hand writing of the President and Cashire, although he had never seen them write, was a good witness. to prove that the names of the President and Cashire on the bills were not the hand writing of the President and Cashire. And after such proof, that the prosecutor might examine as to any mark or character, or appearance of the bill by which it might be distinguished from the true bill.

Orange, August. 1814.

Whitelaw Treasurer of the Passumpsick Turnpike Company *vs.* Cahoon.

An action cannot be maintained in the name of the Treasurer of a Turnpike Company, on a contract made in the name of such Treasurer, but an action on such contract must be brought by the Company in their corporate name.

THIS was an action of *assumpsit* on a certain contract in writing, by which the defendant agreed to take five shares in the stock of

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the Passumpsick Turnpike Company, and to pay to the Treasurer of said Company all assessments that should be made on said shares by the Company, to the amount of twenty dollars on each share, and no more. The declaration set forth that the Company had made several assessments for the purpose of completing their road, stating the amount on the defendant's five shares, with proper averments that the defendant had been notified of the assessment, &c.

To this declaration there was a demurrer and joinder.

Griswold and *Fletcher*, in support of the demurrer, took several exceptions to the declaration—the principal of which was, that the action should have been brought in the name of the Company; that it could not be maintained in the name of their Treasurer.

J. Mattocks and *Paddock* for the plaintiff.

CHIPMAN Ch. J. delivered the opinion of the Court.

Several exceptions have been taken to the declaration, which certainly is not very technically drawn, but the Court have considered it necessary to take notice of but one, which is clearly fatal. It is not stated that the agreement was made with the Treasurer, but the promise was made to pay to the Treasurer. It is an agreement between the defendant and the Company. The consideration was certain shares in the Company stock, and the promise is in effect to pay the Company. The Treasurer is merely their agent, for the receipt and disbursement of monies. The Company is a corporation, capable of suing and being sued, and must sue and be sued in their corporate name.

The Company have power to make certain regulations and by laws, but they can make no by law or regulation, which will enable their Treasurer, or any officer or agent of the Company to maintain an action in his own name. Any other agent of the Company, whom they might authorize to make a contract, might as well maintain an action on such contract, as the Treasurer, in this case.

This question was correctly decided in the case Gilmore against Pope, 5 Mass. Rep. 491. Pope had subscribed for certain shares in the stock of Worcester Turnpike Company, and promised to pay to Gilmore, agent of the Company, all assessments, upon which contract the action was brought in the name of Gilmore the agent. In that case the Court held that the agent could not maintain the

action in his own name, but that the promise would support an action in the name of the Company. There is no essential difference between that case and the present. *Caledonia*, September, 1814.

Judgment for the defendant.

FARNSWORTH *vs.* TILTON.

If a debtor escape from prison, with the consent of the Sheriff, the Sheriff cannot lawfully retake him, yet the creditor may, or he may have his remedy against the Sheriff by an action for the escape, or against the debtor by an action of debt on the judgment.

THIS was an action of debt on judgment. The defendant pleaded in bar, that the plaintiff, after he had recovered the judgment, took out execution, and caused the defendant to be regularly committed thereon to the common gaol in Danville in the County of Caledonia. The plaintiff replied, that the defendant escaped from said prison, not having paid or satisfied his said debt. The defendant rejoined that he the defendant departed from said prison with the express consent, liberty and direction of David Elkins, Sheriff of said County and keeper of said prison. *Caledonia*, September, 1814.

B. Porter for the plaintiff.

J. Mattocks for the defendant.

CHIPMAN Ch. J. delivered the opinion of the Court.

It is impossible to support this plea in bar; the commitment, as pleaded, is no discharge or satisfaction of the judgment. In case of a commitment of a debtor to prison, the body of the debtor is merely a pledge, and so long as the debtor is holden, and continues in prison, the creditor can have no other remedy. If the debtor escape from prison, the debt still remains unsatisfied. The creditor may have a remedy against the Sheriff, but he is not obliged to resort to that remedy—he may still pursue his remedy against the debtor. If a creditor discharge his debtor from imprisonment, it is, at common law, a discharge of the debt; he cannot have another execution, or in any other way pursue his judgment. But, to an action of debt on judgment, it is in no case sufficient to plead in bar

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Farnsworth vs. Tilton.

a commitment only; it must appear that the debtor has been discharged therefrom by the plaintiff, or that the debt has in some way been satisfied or discharged. But, supposing it to be sufficient in such plea to state a commitment of the debtor in execution, without shewing that he is still holden a prisoner, or that he has been discharged therefrom, in such manner as to bar the plaintiff of any further remedy, the plaintiff may avoid it by his replication; and it is certainly a good avoidance, that the defendant escaped from prison, without having been lawfully discharged, and the debt not having been paid or satisfied.

As before observed, the body of the debtor is only a pledge for satisfaction of the debt; in this case it appears that the defendant has illegally withdrawn that pledge, without having satisfied the debt. The replication is a full and complete answer to the matter of the defendant's plea in bar. The defendant rejoins, admitting the escape, but says that he escaped with the express consent and direction of the Sheriff. Now, if a prisoner escape, with the express consent of the Sheriff, and the Sheriff attempt to retake him, such allegation will be good against him the Sheriff; for, if he voluntarily permit a prisoner to escape, he cannot lawfully retake him; but the creditor may, or he may proceed on his judgment, until he obtain satisfaction. The Court are therefore clearly of opinion that there must be

Judgment for the plaintiff.

STATE *vs.* PARKER.

In an indictment for forgery it is necessary to set forth the instrument, charged as a forgery, in letters and figures, unless it be in the hands of the person charged with the forgery—and in that case it is necessary to aver in the indictment, that the instrument is in his possession.

Washington September, 1814.

AT the term of this Court, holden in September, 1813, Ebenezer Parker was indicted for uttering, passing and giving in payment, one certain false forged and counterfeit bank note, made in imitation of a one dollar note issued by the Mechanicks' and Farmers' Bank in the City of Albany in the State of New-York,

which Bank then and there was and still is, legally established, by and under the authority of the Legislature of the State of N. York, one of the United States of America, marked No. 6730, bearing date the first day of January in the year of our Lord 1812, signed by S. Southwick President, and countersigned by G. A. Worth Cashier thereof, and made payable to E. Dor or bearer on demand. The prisoner demurred to the indictment.

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Prentiss, counsel for the prisoner, took several exceptions to the indictment; but the principal exception, and that on which the Court decided, was, that the bill charged to have been forged, was not set forth in words and figures. He contended that it was a principle of the common law, that in an indictment for forgery, it is necessary to set forth the instrument charged to be forged, in words and figures; and that this principle of the common law was recognized and settled by the Courts in the neighbouring States; in support of which he cited Crown Cir Comp. 178. 182. 217. 276. 1 Peak, 173. East's Crown Law, 975. 8 Mass. Rep. 107, Commonwealth against Houghton. He admitted that there had been many indictments in this Court like the present indictment. This novel form of an indictment for forgery, was probably introduced by prosecutors for their own convenience, but no decision of the Court had given them a legal sanction. And this he contended is not a case in which *communis error facit jus.* 3 Johnson's Cases, 299.

Baylies, State's Attorney. This form of an indictment has been settled by a long and uniform practice in this State. Indictments for forgery have in this State generally been drawn in this form for more than thirty years; and not one had been quāshed, or held bad on demurrer, for this exception. The exception I presume has been taken, but it has never prevailed.

Chipman Ch. J. Had I any doubt in this case, as I am alone on the bench, I should postpone the decision; but as I think it a very clear point, I will put neither the publick nor the prisoner to any further expense by delay.

The precedents of indictments for forgery are uniform on this point.—The instrument charged to be forged is set forth in words and figures, in all the numerous precedents which have been produ-

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ced; and all the authorities hold it necessary, unless in certain excepted cases; one of which is where the instrument charged to have been forged is in the possession of the person charged with the forgery. In such case, it is sufficient to describe the instrument, in the same manner in which it is described in this indictment, omitting to set it forth in words and figures; but the fact that the instrument is in the hands of the person charged, which brings the case within the exception, must be charged in the indictment. The common law authorities are collected, and the doctrine on this point is ably commented upon by Judge Sedgewick in the case cited from the 8 Mass. Rep. 107. There is certainly great reason for adhering strictly to these principles; the subject in which the offence is charged to have been committed, ought, in reason, to be set forth with great precision, that there may be no mistake in the proof—no possibility of substituting one thing for another; that the accused may know precisely what he has to meet—how to prepare his defence, and how to direct his evidence. This is a right of the accused at common law—that common law which the fathers of our revolution claimed as their birth-right, and which was secured to us by the event of that revolution. The framers of our constitution constantly kept it in view, and almost the first act of our State Legislature was to declare "that so much of the common law of England, as is applicable to our local circumstances, and is not repugnant to the constitution, or any particular act of the Legislature of this State, be and is adopted as law within this State, and all Courts are to take notice thereof and govern themselves accordingly." It is from this source, the common law, that we derive rules and maxims not only for the construction of our statutes, but of the constitution itself: and, with the limitation expressed, it is the rule of property and the security of our rights; and furnishes to the Courts, in all cases, civil and criminal, a rule of decision. The Courts can no more deprive a person, prosecuted for a crime, of a common law right, than they can deprive him of a statute or constitutional right: modes of practice merely they may alter, for the more safe and easy attainment of the ends of justice, so that they do not infringe any essential right.

But, it is urged that this form of indictment has been in use in this State for more than thirty years—that is, almost from the com-

mencement of the government; that there have been no decisions against it, and that it ought now to be considered as the common law of Vermont established by usage. That laws affecting essential rights, should, by custom, originate in our Courts, independent of the constitution and laws enacted by statute, and in opposition to the principles and maxims of the common law so called, is a thing I cannot understand. It is a doctrine which ought not to be countenanced in this Court. If admitted, we should soon, instead of a system formed and matured by the experience of ages, have a crude undigested mass, or rather farago of opinions, adopted through indolence or want of present information, and adopted and continued in practice, mostly from the same causes. And where are the Courts to look for this common law of Vermont? Not to the authority of decided cases, nor to the writings of the ancient sages of the law, approved through a succession of ages.—No, we must resort for the most part to the fallible memory of the Judges, or members of the bar, or to crude precedents of forms, which may in some Counties, by chance, have long passed without exception, and without notice—I say, in some Counties, because I have observed that in several Counties, indictments are drawn with a scrupulous adherence to the most approved precedents of the common law.

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I would not have it understood, by any thing which I have said, that this Court is limited by the precedents of decided cases, at common law, or the researches of the numerous and profound commentators. The common law, exclusive of positive law, enacted by statute, depends on principles. Precedents and maxims, serve to embody and illustrate principles, to give them a fixed certainty, and afford a facility in applying them to cases as they arise, not coming within any former precedents. I conceive that these principles will be found amply sufficient for their decision, while they preserve the analogy and symetry of the system. The only difficulty lies in applying the proper principle, and in applying it with a due regard to analogy, which is the connecting link, and, indeed, the *sine qua non* of every other system, as well as that of law; and, without which, instead of a system, we should have merely a catalogue of individual cases, affording no illustration of principles—no data for general conclusions.

It is true that a common error sometimes establishes a common

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right: indeed, it is a maxim of the common law. Such cases there are, where an error, first admitted, has introduced a general custom, involving property and individual rights; such custom becomes a law to the Court, and can be superceded by act of the Legislature only. On this ground, it is suggested, that a decision against the indictment, in this case, will affect the rights of the State, derived under a long practice, and may affect former convictions which have been had on similar indictments. But it is impossible to conceive that the State can, under such a practice, become general, and without exception, which it certainly has not in this case, or been of ever so long a continuance, have acquired any right, or can have any interest in the support of such indictment, in violation of the guaranteed rights of the citizen, the rights of the common law, which can be varied only by the constitution of government, or by a sovereign act of the Legislature.

As to former convictions which have been had in this Court, there is no provision of law by which they can be corrected or reversed—they will not be effected—they will remain in full force.

I have extended my observations further than the case under consideration seems to require, because the same argument has before been urged in this Court, and I must say has, at times, received too much countenance, claiming the privilege of this same common law of Vermont, in favour of analogous practices, affecting essential principles, on the ground that the abuse has been suffered long to be continued.

In every view which I have been able to take of this subject, the indictment ought not to be sustained; it is a departure from ancient and established precedents—is condemned by all authorities, both ancient and modern, and violates the most settled principles of law. Let the prisoner be discharged.

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STATE *vs.* STADE.

The statute laws of any one of the United States, if printed under the authority of such State, may be read in evidence in the Courts of this State.

THIS was an indictment for passing a counterfeit bank bill of the Bank of Troy. On trial, to prove that the Bank of Troy was established by and under the authority of the Legislature of the State of New-York, *Baylies*, State's Attorney, offered to read in evidence to the Jury, an act from a printed volume of the laws of that State, published by the authority of the Legislature, which contained the act, offered to be read, incorporating the Bank of Troy, declared to be a publick act.

Ware, for the prisoner, objected to the evidence offered. He contended that although the printed statutes of any State might be admitted in the Courts of such State, yet they could not be so admitted in the Courts of this State; but it is necessary that such act be proved by a certificate under the seal of the State where it was passed.

By the Court. The laws of the other States, printed under authority, have been constantly admitted in the Courts of this State, and such has been the practice of some, at least, of the neighbouring States. If such act be proved, agreeably to the provisions of the act of Congress, the Courts are bound to admit it—they may admit it, although not so proved. Let the act be read from the printed book.

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BARNEY *vs.* GOFF and CADY.

The statute allowing special matters to be given in evidence under the general issue, with notice, dispenses with the form only, not the substance of a plea in bar; and it is necessary in such notice to state the facts relied on as particularly though not with the same technical precision, as in a plea in bar.

A regular judgment, while it remains in force, is conclusive as to every matter; which might have been given in evidence, or pleaded to the action in which it was rendered, except that which must be pleaded in offset.—The same principle obtains in case of a judgment by confession.

Although the Court will not grant a new trial, for any mistake in point of law, which the Court may have made on the trial, if it appear that justice was done in the case, yet if it appear that evidence was improperly admitted, which the opposite party had no opportunity to contradict or explain, as the Court cannot ascertain whether justice has been done in the case, without assuming the province of the Jury, a new trial will be granted.

THIS was a petition for a new trial, in an action tried at the last term of this Court.

On a hearing of the petition, it appeared that Jonathan Barney, the petitioner, had, as assignee of the Sheriff of Washington County, brought an action on a gaol bond executed by Bethuel Goff as principal, and Benjamin Cady as surety. At the last term of the Court, the defendants, by leave of the Court, waiving their former plea, pleaded *non est factum*, with the following notice—"Agreeably to the statute in such case made and provided, the defendants give notice, that they will on the trial give evidence that there is nothing due on said bond, in equity. On trial at the last term,

Prentiss, counsel for the plaintiff, objected to the evidence offered by the defendants under said notice, on the ground that the notice contained no matter of fact, or matter of defence, intended to be proved—nothing by which the plaintiff could learn what he had to meet. The Court overruled the objection, and decided that the defendants might, under that notice, give in evidence any matter tending to prove that there was nothing due on said bond in equity. The defendants then stated that they would prove that the present demand originated in the year 1809.—That in November of that year, Jonathan Barney, the plaintiff, then being Sheriff's deputy, had in his hands for collection, an execution against S. B. for the sum of $190 25 in the whole.—That Jonathan Barney, at the request of the said S. B, settled and discharged said execution, in con-

sideration of which the said S. B. and Benjamin Cady, one of the defendants, executed their note of hand to Jonathan Barney the plaintiff, for the sum of $304 40, and confessed judgment thereon before a Justice of the Peace.—That execution issued on said judgment, upon which several payments were made, amounting in the whole to the sum of $136.—That on the 10th day of June, 1811, Benjamin Cady, one of the defendants, made and executed his note of hand to Jonathan Barney for the balance, being $164 40.—That he confessed judgment on the same before a Justice of the Peace, On which judgment execution was issued on the 3d day of October, 1811, and delivered to Bethuel Goff, the other defendant, being then a Constable of the town of Berlin in said County, which he neglected to execute. And thereupon the said Jonathan Barney commenced an action against the said Bethuel Goff before the County Court for Washington County, at June term, 1812, and recovered judgment against the said Goff for the sum of $179 04 damages, and $9 24 costs, and took out execution on said judgment, on which the said Bethuel Goff was committed to prison, and for the liberties of the prison on that occasion, the said Bethuel Goff as principal, and the said Benjamin Cady as surety, executed the bond on which the action was brought. Bethuel Goff escaped from the liberties of the prison, and in the month of August following, the said Bethuel Goff paid to the said Jonathan Barney the sum of $234 90 in part payment of said debt. By which the defendants relied that they should shew that the original demand with the interest and costs was paid, and overpaid.

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Prentiss, for the plaintiff, objected to the evidence offered, as inadmissible, for that the last payment, though perhaps it might have been pleaded as a set-off, yet the defendants could not avail themselves of it as a payment: and the former payment, if made at all, must be supposed to have been settled in the judgment which followed; and that under such general notice, he insisted that the evidence could not be received, as the plaintiff could not be prepared to meet it.

The Court overruled the objection: the defendants went into the evidence, and the Jury returned a verdict for the defendants. And to obtain a new trial in the case, the plaintiff bro't this petition.

Prentiss, for the petitioner, contended that a new trial ought to

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be granted on two grounds.—1. For that the notice given by the defendants was not of any special matter—that it gave the plaintiff notice of no facts intended to be proved, from which the defendants had drawn the conclusion that there is nothing due on the bond, so that he might be prepared to meet them—that it must and did operate as a surprise on the plaintiff at the trial.—And 2. That after two liquidations between the original parties, and two judgments thereon confessed, and a suit and judgment, no evidence, in point of law, ought to have been admitted, to impeach those judgments, of facts which existed, at the time those judgments were rendered, and of which the debtor might have availed himself as matter of defence or mitigation.—That a judgment while remaining in force is conclusive between the same parties, of every thing, which might have been pleaded in bar, or given in evidence, in mitigation of damages.

Buckley for the petitionees. Notices as general as that in the present case, have often been considered sufficient. The matter admitted in evidence was proper, as it is the province of the Jury to assess the damages, to ascertain what sum if any is due to the plaintiff. The Jury have found that in fact there was nothing, in equity, due from the defendants to the plaintiff; and it appears that justice has been done between the parties, and the Court will not grant a new trial merely for a mistake in point of law.

CHIPMAN, Ch. J. delivered the opinion of the Court.

It is true, as remarked by the counsel for the defendant, that the Court will not easily be induced to grant a new trial, in a case where they can see clearly that justice has been done, merely because the Judges, on the trial, made a mistake in point of law: but it ought to be added, unless the mistake be of such a nature, and of such a magnitude, as that it ought to be corrected for the sake of general justice. The mistake may be of such a nature as to render it impossible for the Court to ascertain whether justice has been done or not. For instance, the admission of illegal evidence may have induced a surprise on the party against whom the verdict was found, so that he could not have had a fair opportunity to produce evidence, on his part, to contradict or explain the testimony which had been admitted against him by such mistake: where that is the

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case the Court will grant a new trial, without inquiring whether such evidence existed or not, or how far it might have been sufficient if produced; for this would be for the Court to assume the province of the Jury, and to try the merits of the cause on a motion for a new trial.

In this case the Court are satisfied on both grounds taken by the plaintiff's counsel. This notice comports neither with the letter nor the spirit of the statute. The statute (the 98th Section of the Judiciary act) permits the defendant to plead the general issue in any action according to the nature of the case; and under such general issue to give any special matter in evidence in his defence or justification, as the nature of the action may be, "the defendant giving notice in writing with the plea, of the special matter or matters, on which he or she shall rely in his or her defence or justification. And no special matter shall be given or allowed in evidence, except such as shall be particularly mentioned in such notice in writing as aforesaid."

The notice in this case, as has been well observed, is not of any matter of defence or justification whatever, but of a general conclusion: and, it may be added, without premises. Not a fact is therein suggested, from which such conclusion is intended to be drawn. The defendants might as well have said, we will prove enough on trial to obtain a verdict, and call it a notice under the statute.

How strict or how loose the Court might have formerly been, we cannot say; but the present Judges have refused to permit the defendants to go into proof of any matter not particularly mentioned in the notice; and have held that such notice under the statute, must contain the substance of a special plea in bar, and that the facts relied on must be as particularly set forth, though the same technical precision is not required. It was so decided in the case Bowdish against Peckham (ante page 144.) The statute dispenses with the form only, not the substance of a plea in bar. The notice, as it is called, in this case, the plaintiff could not know—there was no hint given him of the facts which the defendants intended to prove on the trial.—It cannot therefore be supposed that the plaintiff could come prepared to meet the evidence produced by the defendants on the trial. The notice seems to have been framed for the purpose of surprising the plaintiff. After the trial has been had, how is it possible for the Court to discern whether justice has

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been done in the case?—A fair opportunity has not been given to the plaintiff—it is impossible therefore for the Court to know what is the justice of the case.

But, under any notice, the evidence which was offered on the part of the defendants ought not to have been admitted. Every regular judgment, while remaining in force, is conclusive as to every thing which might have been pleaded or given in evidence in defence, or to lessen the damages, except that which may be pleaded in offset. And this principle applies as well to judgments rendered on confession, as to those rendered in adversary suits; otherwise no judgments are final—no litigation could ever be closed.

Now there was no one matter in the defendants' statement, on trial, except the last payment, but what might and ought to have been included and settled in some one of the judgments which had been rendered in favour of the plaintiff. The amount of payments the law presumes to have been settled from time to time, and each judgment to have been rendered and confessed for the sum actually due. No fraud, imposition or mistake is suggested which might be a ground of relief even in a Court of Equity. If the defendants had paid any sum which from mistake had not been applied, perhaps it might have been pleaded by way of offset: but such proof could not be admitted under a statute notice.—It is not matter either of defence or justification. A plea in offset is in the nature of an adverse suit, and must be pleaded in the manner pointed out by the 92d Section of the Judiciary Act.

New trial granted.

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1814.

ALDIS *vs.* HULL.

The Act directing proceedings against absconding or concealed debtors, provides that if execution shall issue against the goods and chattels of the principal debtor, in possession of the trustee or trustees, and a return be made by any proper officer on such execution, that such trustee or trustees refused or neglected to expose such goods and chattels, or to pay the amount of such execution, if there be sufficient in his, her or their hands and possession, the Court shall, *on motion* of the creditor, grant a rule to shew cause why execution should not issue on such judgment against such trustee or trustees, his, her or their proper goods and estate.—And a *scire facias* cannot be substituted in the place of such motion—the creditor cannot, in such case, have a remedy by *scire facias*.

ASA ALDIS, the present plaintiff, commenced his action before the County Court in September, 1811, against Justin Wells, an absconding or concealed debtor, and summoned Samuel Hull, the present defendant, as his trustee. Hull, the trustee, at the same term of the Court, made a disclosure on oath; and the Court adjudged him to be a trustee of Wells, the absconding debtor; and found that he had in his possession goods and chattels, rights and credits of the said Wells to the amount of two hundred dollars. And Aldis, at the same term, obtained a regular judgment against Wells, the absconding debtor, for $51 84 damages, and $13 29 costs of suit; and took out execution thereon, as awarded by the Court, against the goods and chattels of the said Wells, in the possession of the said Hull the trustee, dated the 30th day of September, 1811, and delivered the same to a proper officer, who made return thereon that he had demanded of Hull the trustee, to expose the goods & chattels of the s'd Wells, in his possession, for the purpose of satisfying said execution; and that he neglected and refused to expose such goods and chattels, or to pay the amount of said execution. Whereupon, Aldis brought a *scire facias* in the County Court, reciting the proceedings in the suit against Wells, in substance as above stated, and praying for an execution against Hull the trustee, of his own proper goods, &c.

To the *scire facias*, Hull the trustee pleaded, that the plaintiff ought not to have execution thereof against him, for that, in the original action he had disclosed, that he held in his own name, a note of hand, for the sum of $600 against one R. W. of Georgia in said County of Franklin, secured by a mortgage on a certain lot of land

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Aldis *vs.* Hull.

stroyed by inevitable accident, without any default in him, he is discharged. In this action against an absconding or concealed debtor, by the decision of the Court, that the trustee has in his possession the goods or estate of the principal debtor, the bailor or *cestueque trust* is changed; the plaintiff, the creditor, is substituted in place of the original bailor or *cestueque trust*. But no other change is thereby effected: no new duties, or other conditions are thereby imposed on the trustee. To every claim of that kind it is a sufficient answer for him to say *non in haec foedera veni*, I entered into no such agreement. He is still holden to use the same care, diligence and good management, and no more. The same inevitable accident taking place after the disclosure, will excuse or discharge him in his new relation, which would have been a good excuse or discharge against the original bailor or *cestueque trust*; and would be a good cause to be shewn on his part why execution should not issue against his body or against his own proper goods and estate.

Although the Court do not decide on the defendant's plea, I will briefly observe that the failure of the security does not sufficiently appear to have happened after the disclosure. And the *scire facias*, if it be a proper remedy, does not sufficiently set forth the record. It ought to set forth the whole disclosure or proof on which the Court decided, and which the statute directs to be recorded, for the purpose of settling thereafter the rights of the parties. I should not be ready to admit, that a record merely that the person summoned, was adjudged to be a trustee, to a certain amount, without a record of the examination or proof on which the adjudication was made, would hold the trustee accountable for any thing.

But the ground on which the Court decide is, that a *scire facias* is not the proper legal remedy in this case. It will be kept in view, that this proceeding against the trustee of an absconding or concealed debtor is not a common law proceeding, or governed by common law precedents: it is with us a mere statute provision, and the proceedings are regulated and directed by the statute. The process of foreign attachment, founded on the custom of London, was indeed somewhat similar to our statute provision—at least it had the same end in view; but it was a local custom, and not a part of the general common law of the Kingdom.

It is true, that at common law, a *scire facias*, to have execution of a judgment or recognizance, which is a judgment with a defeasance, lies in the same Court where the judgment is of record. But in the case under consideration, the proceedings are regulated by the 5th Section of the Act directing proceedings against the trustees of absconding or concealed debtors; by which it is provided, "That if the trustee or trustees shall appear at the Court, and it shall be made evident by his, her or their oath, or by other proof, that the trustee or trustees had monies, goods, chattels, rights or credits of the principal debtor in his, her or their possession, at the time of the service of such process, or at any time since, a record thereof shall be made, &c."—that is, as I understand it, a record shall be made of the whole disclosure of the trustee, as made on oath, or of the proof produced by the plaintiff, the creditor, and that for the very good reason which I have before mentioned—for the purpose of settling the future rights of the parties. "And such trustee or trustees shall be liable to the plaintiff for the money, goods, chattels, rights and credits so found in his, her or their hands or possession, to the amount of the judgment recovered against the principal debtor, if so much there be, and execution shall issue on the judgment so recovered against the goods and chattels in the possession of such trustee or trustees."

The finding of the Court against the trustee is nowhere called a judgment, and may with propriety be called an inquest; and is a foundation for future proceedings, as provided by the statute. The 6th Section points out the special mode of proceeding which the plaintiff must pursue in order to obtain the effect of his judgment against the principal debtor, out of the effects in the hands of the trustee. "That if execution shall issue against the goods and chattels in the possession of the trustee or trustees, and a return be made by any proper officer on such execution, that such trustee or trustees, refused or neglected to expose such goods and chattels, or to pay the amount of such execution, if there be sufficient in his, her or their hands or possession, the Court shall on the motion of the creditor, grant a rule to shew cause why execution should not issue against such trustee or trustees or their goods and estate; and upon affidavit of the service of such rule on the trustee or trustees,

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and no sufficient cause being shewn to the contrary, such execution may be awarded."

A *scire facias* would not lie at common law, in this case, from any analogy, and the statute does not give it; but specially provides another remedy, and that remedy must be pursued: A remedy much better adapted to the nature of the case, and very wisely adopted instead of a *scire facias*. A *scire facias* would, as we see in this very case, often be attended with that delay and expense incident to the common course of judicial proceedings, and frequently more than exhaust the whole subject of litigation. The mode pointed out by the statute, is less expensive, more expeditious, and free from the technical forms and niceties of special pleading. It gives a fair opportunity to examine at large into the real justice of the case, which will often depend on a variety and complication of circumstances. The trustee will be at liberty in shewing cause, to avail himself of every fact and legal matter, to discharge him from further liability either in whole or in part, by proper documents and affidavits, which the creditor may controvert in the same way; and the Court will be enabled to decide agreeably to the justice of the case.—It is much the most advantageous for all parties—certainly so for the plaintiff.

In this view of the case, (and we think it the only legal view which can be taken of it) the Court are clearly of opinion that a *scire facias* is not the proper remedy in this case. There must therefore be

Judgment for the defendant.

Franklin,
December,
1814.

ELISHA BARNEY

vs.

TRUMAN CURRIER, LUTHER MORE, and MOSES JEWETT.

In Chancery.

Notice to one of two or more partners of a prior unrecorded deed, is notice to all the partners, and will render void a subsequent deed of the same land to all the partners.

THIS was a bill in Chancery in which the Orator stated, in substance, that on the 20th day of May, 1807, the Orator being indebted to Levi Hungerford in the sum of $205, as security therefor, conveyed to the said Hungerford, by his deed of that date, a certain farm of land situate in Swanton in the County of Franklin, containing one hundred acres; and at the same time, the said Levi Hungerford executed a bond to the Orator with a condition, that, if the Orator should, on the first day of September, 1807, pay to the said Levi Hungerford the said sum of $205 with interest, the said Hungerford should reconvey the said farm to the Orator.—That it was considered by the parties as a mortgage.—That on the 25th day of July, 1807, the said sum of $205 not having been paid, and the said Hungerford being indebted in the same sum to Truman Currier, Luther More, and Moses Jewett, who then carried on the business of saddlery in partnership, the said Luther More and Moses Jewett residing in Burlington in the County of Chittenden, and the said Currier residing in said Swanton, there carrying on the said business, as sole agent and manager for said company, in payment of said debt so due from him the said Hungerford to said company, as aforesaid, assigned, sold and conveyed all his right in said farm to the said Truman Currier, Luther More, and Moses Jewett.—That they the said Currier, More, and Jewett, at the time of receiving said conveyance of said farm from the said Hungerford, had full knowledge of the aforesaid agreement between the Orator and the said Levi Hungerford, and of the said bond given by said Hungerford to the Orator for a reconveyance of the premises as aforesaid; and they actually received said conveyance from the said Levi Hungerford, as a security for the said sum of $205 with interest.—That afterwards, on the 25th day of July, 1809, the Orator

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paid to the said Truman Currier, then acting for and in behalf of said company, the said sum of $205 with the interest thereon due; and the said Currier, for and in behalf of said company, received the same of the Orator, as and for the redemption of the said farm from the said mortgage, and did thereupon agree with the Orator to reconvey to him the said farm. And afterwards, to wit, at Swanton aforesaid, on the 26th day of July aforesaid, a deed was made out accordingly by the said Currier, from him the said Currier, More and Jewett to the Orator, for the purpose of reconveying said farm to the Orator, which was executed by the said Currier; and, as the said More and Jewett were absent at Burlington aforesaid, the said Currier agreed to procure the said More and Jewett to execute the same, and received the instrument by him so executed for that purpose. But the said Currier, combining with the said More and Jewett to defraud the Orator, did fraudulently convey all his right to said premises to the said Jewett.—And that the said Jewett has with a like fraudulent intent procured from the said More a conveyance of said premises, and has commenced an action of ejectment against the Orator to recover possession—praying relief, &c.

Truman Currier did not appear, and the bill as to him, was taken as confessed.

Luther More appeared, and answered, that in July, 1806, he entered into partnership in the saddling business, with Moses Jewett, one of the defendants, at Burlington.—That in September following, he and the said Jewett entered into partnership with Truman Currier the other defendant, for the purpose of carrying on said business at Swanton.—That the said Currier was intrusted with the sole management of the business at Swanton, and that he the said More had no personal knowledge of the management of the business there.—That afterwards, in September, 1807, he, by the consent of the other partners, withdrew from the concern at Swanton, and assigned his interest therein to the defendant, Moses Jewett, who agreed to pay all the company debts, and indemnify him the said More against them; and that he had no further concern with the business at Swanton.—That he had no knowledge of the transaction between the Orator, Hungerford and Currier, relating to the premises.—But that some time after he had withdrawn from said

concern at Swanton, (the time he could not recollect) the said Moses Jewett applied to him for a release of his right in the premises; and on such application, and in pursuance of his former agreement, on withdrawing from the concern at Swanton, he did make a release to the said Jewett accordingly, having no knowledge of the Orator's claim to the premises.

Moses Jewett, in his answer, stated the several partnerships, and the withdrawing of Luther More from the concern at Swanton, and the assignment of More's share to him the said Jewett, as stated in the answer of More; and then proceeded to state, that in October, 1808, the partnership between him and Truman Currier was dissolved by mutual consent.—That the said Currier was then indebted to him to the amount of fifteen hundred dollars, in part payment of which he received from said Currier a conveyance of his share in the premises, as purchased of Levi Hungerford, at the sum or price of five hundred dollars—the whole of the premises being estimated at fifteen hundred dollars. He admitted, that about that time or before, he had heard a report that Truman Currier had received a sum of money from the Orator, Barney, and had agreed to convey to him the premises; on which he made inquiry of Currier as to the truth of the report, who said that the Orator, Barney, held his receipt for a sum of money, for which he had agreed to convey to him (Barney) his (Currier's) share of the premises, being one third part.—That he had offered so to convey, but said Barney had wholly refused to accept such conveyance. And the said Jewett in his answer, denied that he had ever agreed to convey, or procure a conveyance of the whole premises from the partners. He conceded that Truman Currier was the only acting partner in the concern at Swanton. He denied that he had himself received any consideration from the Orator, on account of the premises, and that he had no personal knowledge how the partnership business at Swanton was conducted, or of the purchase from Levi Hungerford, or of whom Currier purchased the premises.

The answers were traversed, and the following exhibits and evidence appeared on trial. An office copy of the Orator's deed to Levi Hungerford was produced, and the bond from Hungerford to the Orator, with the condition, as set forth in the bill. It was also proved that Truman Currier, at the time of his puachase from

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Hungerford, was fully informed of the bond and condition, and of the nature of that transaction, and that he took the conveyance, as was then well understood, subject to that condition; and that the consideration was no more than the sum due from the Orator to Hungerford, the consideration expressed in the deed from Hungerford to Currier, and that he took it on account of a partnership debt to that amount, due from Hungerford to the company. Hungerford's receipt for the money from the Orator was also produced and proved, and also his agreement to reconvey his execution of an instrument for that purpose, intended to be executed by the other two partners, and his receipt for that instrument, containing a promise to procure it to be executed by More and Jewett.

Brayton, for the plaintiff.

E. Keyes and *Allen* for the defendants.

It was contended on the part of the Orator, that the deed to Hungerford, with the bond from Hungerford to the Orator executed at the same time, with a condition for a reconveyance, on the payment of a certain sum of money, at a particular time specified, constituted a mortgage in equity, between the original parties, although the bond was not put on record with the deed; and that it would continue a mortgage in the hands of all subsequent purchasers, having a knowledge of the plaintiff's equity.—That, as Truman Currier, purchased with full notice of the Orator's equity, valued the premises accordingly—paid a consideration only to the amount of the debt intended to be secured to Hungerford on the premises, it was the strongest possible case of notice to Currier. And as he took it for a partnership debt, and as it is acknowledged by all the defendants that he was the only acting partner, and sole agent for the company in their concern at Swanton, notice to him was notice to all the partners.

On the part of the defendant, it was contended, that however a deed of conveyance of land, with a separate defeasance, or a bond for the reconveyance by the grantee, executed at the same time, but not recorded, might operate in equity as a mortgage between the original parties and their heirs; yet, by our statute, it cannot have that effect against creditors or subsequent *bona fide* purchasers for a valuable consideration.—They have only to look to the

records for the title to lands, and for incumbrances on them. And they must hold against a prior unrecorded deed, unless actual notice of such prior deed be proved.—That this is not the case with Jewett, in whom the legal title was vested for a valuable consideration.

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CHIPMAN, Ch. J. delivered the opinion of the Court.

It is true that by the 5th Section of the Act regulating conveyances of real estates, it is enacted, that no deed of bargain and sale, mortgage or other conveyance in fee simple, of any lands, tenements or hereditaments, shall be good and effectual in law, to hold such lands, tenements or hereditaments, against any other person or persons but the grantor or grantors and their heirs only, unless the deed or deeds thereof, be aeknowledged and recorded, as is provided in the act; but we must take this in connexion with the 14th Section of the same Statute, which provides, "That all fraudulent and deceitful conveyances of any lands, tenements or hereditaments, procured, made or suffered, with intent to avoid any right, debt or duty of any person or persons, shall as against such person or persons, whose right, debt or duty is so intended to be avoided, his, her, or their heirs or assigns, be utterly void, any false pretence or feigned consideration to the contrary notwithstanding.

In the construction of this statute, these two sections must be taken together. For one person knowing of the right of another, wanting some thing only in form, to its completion, for instance the deed not on record, to intercept that right by taking a conveyance, legal in its form, and procuring it to be first recorded, is a gross fraud, and clearly within the 14th Section of the Act above recited. In such case the deed is void, as well at law as in equity; and if brought before a Court of equity, it will generally afford sufficient relief, to declare such subsequent deed void: but if the fraud has extended, to destroy or intercept the evidence of the prior right, the Court will suffer the fraudulent deed to stand in the chain of title, and decree a conveyance to the person entitled in equity. This principle will extend to every person sought to be injured by the fraudulent act, according to his right; not only to him who claims an absolute right, but to all who claim a conditional, defeasable or equitable interest—as well to a mortgagor, in respect to his equitable interest, his right of redemption, as to the mortgagee, in respect

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to his legal lien for the security of his debt. The principle is perfectly obvious, and the construction not only consistent with the general objects and design of the statute, but even necessary to their attainment. A contrary construction would, instead of a prevention, render the statute a protection of fraud. And, beside, it has been so long established, that it cannot be permitted now to be shaken.—It is no less firmly established that notice to the agent is notice to the principal, and shall affect him the same as personal notice.

To apply this principle to the present case: Truman Currier was himself a principal, and being in the concern at Swanton the only acting partner, he was to all intents the agent of his co-partners, the other defendants. He agreed, in behalf of the partnership, to take a conveyance of the premises to satisfy or secure a partnership debt; and he was informed of the Orator's right—that Levi Hungerford held the premises, merely as a security for a debt due to him from the Orator. As Hungerford then intended to sell, so Currier must have intended to purchase, subject to the Orator's right of redemption, and gave a consideration accordingly. The amount of the debt due from the Orator to Hungerford, was made the consideration of the deed which Currier received. The deed of conveyance was in form absolute and unconditional. This might or might not have been fraudulent in its inception, according to the use it was intended to make of it afterwards. By this knowledge, and by these acts of their acknowledged agent, the other defendants are bound equally in law, equity and good conscience. The conveyance from Hungerford, was taken to all the defendants, members of the partnership. Truman Currier went farther—he received the redemption-money of the Orator, the full amount of the debt due the company, to secure the payment of which, the conveyance was made: He thereby bound the other defendants as well as himself to convey the premises to the Orator. He did, on his part, execute a deed of reconveyance, prepared for him and the other defendants to execute—he took it, and agreed to procure it to be executed by the other defendants. Here the fraud began to appear. He neglected to procure the deed to be executed by the other defendants, and took measures to defeat the Orator's claim and preredemption, although he had received the full sum of the re-

demption, and conveyed his share, one third part, to Moses Jewett, one of the other defendants.

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Luther More does not appear to be at all implicated in this foul transaction. He had, by consent, withdrawn from the partnership concern in Swanton, and it does not appear that he had any personal knowledge of this transaction; and although his name had been made use of in the conveyance from Hungerford, (he being then a partner) he appears very honestly, on Jewett's application, to have released his share as he supposed he was in equity and good conscience bound to do; but Jewett, the other defendant, is deeply implicated. He insists, in his answer, that he is a *bona fide* purchaser for a valuable consideration; but he concedes, that at the time he took the deed from Currier, he had heard a report that he (Currier) had received a sum of money from the Orator, and had agreed to convey the premises to him. He also concedes, that on inquiry, Currier acknowledged that the Orator held such receipt which he had given him, and that he had agreed to convey to the Orator one third part of the premises, and that the Orator refused to accept such conveyance, but that Currier denied that he had ever agreed to convey the whole of the premises to the Orator, or to procure a conveyance from the other partners. The manner of expression, and the degree of caution used, clearly show that Jewett had been correctly informed of the whole transaction, and yet he claims to hold the premises against the Orator, contrary to equity and good conscience.

As the evidence of title is now in Jewett, there must be a decree that he convey the premises to the Orator, and that he and Currier pay costs; and that Luther More, the other defendant, be dismissed without costs.

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JOHN WARD *vs.* AMOS MORRIL and LUMAN WARD.

In Chancery.

If husband and wife join in a conveyance of real estate, which the husband held in right of his wife, the purchase money received by the husband, becomes his personal property: and if the husband, with the avails of such estate, purchase other lands, and take a deed of the same to his infant son, and hold the same unrecorded, it remains absolutely under his control, and the son can have no remedy against the father, or any other person, either for the deed or the lands therein described.

THE Orator in his bill stated, that on the 14th day of May, 1795, William Coit was the lawful owner of Welden's Island and Ward's Island in Lake Champlain in the County of Franklin, and on the same day sold, and, by deed, conveyed the said Islands to Jesse Welden, in fee, which deed was never recorded.—That afterwards, on the 11th day of July, 1795, Jesse Welden, in consideration of the sum of £85, sold and conveyed the same to the Orator, by a good deed of conveyance, made and delivered to Luman Ward the father and natural guardian of the Orator, (the Orator then being a minor, about eleven years of age) to deliver over the same thereafter to the Orator.—That the said Luman, as father and natural guardian of the Orator as aforesaid, immediately took possession of said Islands, and laid out large sums of the Orator's money in improving the same.—That afterwards, on the 14th day of September, 1795, the said Luman being in possession as guardian as aforesaid, let the premises by lease to Amos Morril of St. Albans in the County of Franklin, to hold the same until the 7th day of October, 1806.—That Luman Ward received of the said Morril for the use of the premises, about $400, for which he has never accounted with the Orator.—That afterwards, the said Amos Morril, well knowing the right of the Orator, combining with D. Baker, administrator of the said J. Welden, then lately deceased, did fraudulently procure the said deed from William Coit to Jesse Welden to be delivered up to said Coit. And the said Coit on receiving a bond of indemnity from the said Morril, did, on the 10th day of January, 1798, execute to the said Morril a deed of conveyance of the said premises, which deed was acknowledged and recorded in the proper office—That afterw ards, (no date) the said Morril, by

false representations, induced the said Luman to deliver up to him the said Morril, the said deed from J. Welden to the Orator, and at the same time promised to convey the same premises to the Orator, when he should be thereunto requested. The bill then charges that Morril refused so to convey the premises, but claimed and held the same against the Orator, praying an account, relief, &c.

To which bill the defendant, Morril, answered—That in the year 1796, he, the defendant, gave a receipt to the Sheriff of Franklin County, at the request of Luman Ward, for a number of cattle taken on an execution of A. Hastings against the said Luman.—That the cattle were left in the custody of said Luman, who otherwise disposed of the same, so that they were not turned out to the Sheriff for sale; wherefore, he, the defendant, often applied to Luman Ward for repayment, but he not being able to repay the money, proposed to the defendant to take a lease of the Welden and Ward Islands, until he should repay himself out of the rents and profits of the same. On inquiring respecting the title, Luman Ward informed the defendant, that when he purchased the Islands, he, at the request of his wife, took a deed to his son John, for fear of what might happen, as the defendant then understood, for fear of creditors.—That he did not understand or learn that Luman Ward held the same in trust for the Orator. About three years since, and not before, he heard a report that the Orator made such claim. When Luman Ward made the said proposal, he offered the defendant a lease ready drawn accordingly, which the defendant refused. Some time afterwards, Luman Ward proposed to the defendant, that Jesse Welden's deed from Coit should be given up, not having been recorded, and a deed procured from Coit to the defendant and that the defendant should give a durable lease of the premises to Luman Ward, reserving an annual rent equal to the interest of the debt then due, with an agreement that on Luman Ward's paying any sum not less than $100 at one time, the rent to be discharged in that proportion until the whole should be paid, which proposal was accepted.—That the defendant verily believed at the time, that the said Luman Ward had a just right so to dispose of the premises.—That some time after, the defendant and Luman Ward together had a conversation with said Coit, who agreed upon receiving the deed which he had given to Welden, to

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make a deed of the premises to the defendant, which he then, or soon after did; and the defendant executed a lease to Luman Ward agreeably to his proposal. He does not recollect that the deed to Welden was then given up to Coit, or that he gave to Coit a bond of indemnity, and cannot say that he ever saw the deed from Welden to the Orator, and knows not where it is.—That he does not recollect that he received from D. Baker, administrator of J. Welden, the deed from Coit to said Welden, or that he ever conversed with him on the subject, until about two years ago, and since the commencement of this suit. He denies that he ever promised to convey to the Orator.—That in the spring of the year 1804, the said Luman Ward proposed to change the lease of the Islands from himself to his son John, the Orator; and as the Orator then had a family, and was doing business for himself, the defendant supposing him to be of full age, consented. The old lease was cancelled, and he executed a lease to the Orator, the same in substance as the lease cancelled, at which time the defendant had not understood from the Orator, or any other person, that the Orator had any claim to the premises.

Luman Ward, the other defendant, answered—That he, the defendant, was not knowing to the existence of the deed from Coit to Welden, otherwise than by information from Welden and Coit.—That he, the defendant, married Mary, his present wife, in Guilford, in the State of Connecticut.—That at the time of their marriage she was seized and possessed of real estate of the value of about $1500, in her own right. A short time after the marriage they sold that estate, and with part of the price, $234, purchased a farm in Georgia in the County of Franklin, a deed of which was made to Mary his wife. The remaining part of the price was principally laid out in buildings on the farm.—That some time after, he made a contract with Jesse Welden for the purchase of the Islands, and consulted with his wife about selling the Georgia farm to enable him to pay for the Islands, and to pay some debts; she consented, on condition that the conveyance of the Islands should be made to their son John, then an infant about eleven years of age, (the present Orator.) Accordingly he sold the farm in Georgia, and his wife joined in the conveyance.—That he soon after completed the contract with Welden and took a deed of the Islands to his son

John; which deed was never recorded.—That he kept it in his possession until January, 1798, when A. Morril informed him that he (Morril) had procured a conveyance of the Islands from Coit to himself, and shewed him the deed, saying the first deed on record would hold—that his was first recorded and should hold the Islands. At the same time he offered to give a bond to execute a deed to his wife, the Orator's mother, on payment of the Hastings debt, and such other sums as should be found justly due to him, (Morril) from this defendant within three years. Whereupon, being ignorant and supposing the deed from Welden to his son would be of no use, he gave it up to Morril, and Morril executed a bond accordingly He farther says that he conceives that he took the deed from Welden and held the premises in trust for his son.

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There was a traverse of the answers, and the case was heard upon evidence which is stated in the opinion of the Court.

CHIPMAN Ch. J. delivered the opinion of the Court.

The points relied upon by the counsel for the Orator are,

1st. That he was, while an infant of eleven years of age, a purchaser for a valuable consideration, of the Islands in Lake Champlain, known by the name of the Ward and Welden Islands, and

2dly. That the defendants, Luman Ward, father of the Orator, and Amos Morril combined together fraudulently to defeat the Orator's title.—That the title having been derived from William Coit to Jesse Welden, and from Jesse Welden to the Orator, the deeds both from Coit and J. Welden not having been put on record, were fraudulently delivered up or destroyed, and a deed of the premises procured from Coit to A. Morril. On these grounds he prays relief, and also prays that A. Morril may be decreed to release to him the title derived from William Coit, and also prays an account, charging that L. Ward, his father, by himself, and A. Morril, his tenant, had the possession and occupation of the premises from the month of July, 1795, to ———.

It is in proof that some time in the summer of the year 1795, Luman Ward, the father, contracted with Jesse Welden for the purchase of the Islands, for the consideration of £85, which he paid to Welden and took a deed from Welden to his son John, the Orator, then an infant about eleven years of age, and the only son of Luman Ward and Mary his wife. It is in proof also, that the rea-

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son given by Luman Ward, why the deed should be executed to his son, was, that the purchase money was raised out of his mother's estate; and that Welden had purchased and held the premises by deed from William Coit; and at the time of the intermarriage the wife was seised and possessed of real estate in her own right which was sold for one thousand dollars, and that she joined in the conveyance.—That soon after Luman Ward purchased a farm in the town of Georgia in this County, and the same was conveyed by deed to the wife.—That a short time before the purchase of the premises by Luman Ward, he sold the farm in Georgia, and the wife joined in the conveyance. There is no further proof of any circumstances attending these several transactions, except what is disclosed by the defendants, each of whom answers for himself, and the answer of neither is evidence against his co-defendants. These answers, although they have been suffered to pass without exceptions, are not a little remarkable. The answer of Morril is shamefully evasive; and that of Luman Ward, the father, seems to have been drawn up advisedly, with a principal view to the son's interest, and to charge A. Morril, under an expectation, that it would be evidence against him. Luman Ward, in his answer, among other things, says, that his wife Mary consented to the sale of the farm in Georgia upon consideration that the Islands should be conveyed to their son John; and that he conceived himself to hold the premises in trust for his son. These conceptions may affect himself, so far as they shall be found relevant in the cause. The other defendant, Morril, admits that at the time he became interested in the Islands, he had learnt from L. Ward that the deed was taken to his son John, the Orator, as he (Morril) understood for the purpose of securing the premises against the father's creditors. This is all the evidence any way material to support the Orator's right. Before I apply this evidence, I will state the evidence on the other point, that of fraud, as it will be found to have a bearing on the question arising upon the first point relating to the Orator's right in the premises, especially as it concerns Morril. The proof arises principally from the conceptions of the defendants stated by them in their answers. The defendant, A. Morril, states that some time in the year 1796, he receipted to the Sheriff a number of cattle, belonging to L. Ward, which had been taken on an execution at the

suit of A. Hastings.—That he left the cattle in L. Ward's custody, and he disposed of them, so that they were not forth-coming to satisfy the execution.—That a suit was thereupon commenced against him, (Morril) and he was compelled to pay the debt to Hastings, amounting to about $400. This statement is supported by proof. The amount of the execution in favour of Hastings against L. Ward, appears to have been $394 46, besides costs. He further states that he soon after applied to L. Ward for payment or security of what he had so paid.—That L. Ward offered to give him a lease of the Islands by way of security, which he refused.—That some time after L. Ward proposed, that the deed from W. Coit to J. Welden, not being recorded, should be given up, and a deed of the Islands taken from Coit to Morril, and that Morril should make to L. Ward some further advances, and make to him, (Ward) a durable lease of the premises, reserving a rent equal to the interest of the money then due; and what should be so advanced, with a right in L. Ward to extinguish the rent by payment of the principal in sums not less than $100 in any one payment.—That soon after he and L. Ward had a conversation with Coit on the subject, and that either then or soon after, Coit executed a deed to him (Morril) of the premises. There is no other proof of such proposal by L. Ward, or of his applying with Morril to Coit. Morril further says, that he cannot say whether the former deed from Coit to Welden was given up—that he ever saw it, or knows what has become of it, or that he gave Coit an indemnifying bond. It is, however, in proof, that Welden's administrator did deliver that deed to Morril, and that Morril gave Coit a bond of indemnity. He does not say that he gave a lease to L. Ward according to the proposal, but this is also in proof. He goes on to state, that in the spring of the year 1804, L. Ward proposed to him to change the lease of the Islands, by giving one of the same tenor to his son John, the Orator, who was then married and doing business for himself, and was, therefore, supposed by him (Morril) to be of full age.—That accordingly, by mutual agreement between him, Morril and L. Ward, the father, the old lease was cancelled, he executed one of the same tenor to John the Orator, which being produced, agrees with the cancelled lease, and the terms of the proposal said to have been made by L. Ward. On this point, L. Ward states that in Janua-

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ry, 1798, A. Morril informed him that he had procured a deed of the Islands from Coit, and caused it to be recorded; and that the first deed on record would hold—that is, against a former deed that had not been recorded. We may note here that L. Ward, although charged in the bill with having been concerned with the other defendant, in giving up the first deed from Coit to Welden, and procuring the second deed from Coit to Morril, neither admits nor denies any knowledge of, or part in the transaction. He says only, that Morril, in January, 1798, informed him that he had procured a deed from Coit, but without any statement, in terms, that this was the first information or knowledge he had of that transaction; nor is any exception taken to this omission on the part of the Orator. L. Ward goes on to say that Morril proposed to give a bond obligating himself to convey the premises to Mary, wife of L. Ward, and mother of the Orator, on payment of the Hastings debt, and what should appear to be justly due from L. Ward to Morril, on other accounts, within three years.—That he (L. Ward) being ignorant, and supposing that Welden's deed to John Ward would be of no further use, gave it up to Morril and executed a bond as proposed. This bond is in evidence, but he makes no mention of any debt to Morril, or lease either to himself or his son, the Orator. All this however, as has been observed, has been proved, and seems to shew the nature of the transaction between the defendants themselves, and the inducements under which they acted. The inducement to Ward appears to be the payment of a debt, which we ought to suppose he was anxious to discharge, and to Morril, to obtain security, and that alone; for he gave two chances of redemption, first on the payment of the debt within three years, then a chance to extinguish the rent reserved on the lease at any future day or days. This was in the nature of a legal right of redemption, and which could not be foreclosed. If we add to this the cautious silence of Luman Ward, respecting his previous knowledge that the Welden deed had been given up to Coit, and a deed obtained from Coit to Morril, there is sufficient proof, as the matter stands between the defendants themselves, that he (L. Ward) did consent to that transaction and had determined to abandon his first intention in favour of his son, and to exercise his own power and right over the estate.

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The question first to be decided is, was the Orator a purchaser for a valuable, or, as to him, any consideration, with a vested right, or if not a purchaser for a valuable or other consideration, did the transaction amount to a voluntary conveyance, or to a pure gift to the son, completed by an actual investment of right in him? If this be decided against him, it will be unnecessary in this case, to make farther inquiry respecting the fraud which has been alleged.

In deciding this question, it is material to consider the situation of the parties. The father was seised of real estate in right of his wife. He sold this property, the wife joining in the conveyance, and as he received the purchase money, it became both at law and in equity his personal property. It is true the money arising on such sale, might with the consent of the husband, be vested in trustees for the use, or to be at the disposal of the wife, and thereby the marital rights of the husband respecting it, effectually barred or controled. But, from any thing that appears, nothing of the kind was done at that time, or intended to be done. Afterwards, it is true, the farm in Georgia was, on the purchase, conveyed to the wife, which, though a proper act as between them, was merely voluntary in the husband. On the sale of the Georgia farm, in which the wife also joined, it does not appear explicit from the answer of L. Ward, that there was any stipulation between the husband and wife, or intention to reserve any part of the avails to the sole use of the wife, or to be under her control or direction; but it is in proof that on the purchase of the Islands, L. Ward gave as a reason why the deed of conveyance should be made to the son, that the purchase money was raised by a sale of the property of the wife; and that she wished the conveyance to be so made.—This also, as it relates to the wife as well as to the son, was a mere voluntary act of the father. For although the deed purported a consideration advanced by the infant son, who was then only eleven years of age, yet, in fact, it was advanced by the father, and between the father and son was as much a voluntary act, as though he had taken a deed from Welden to himself, paying the consideration with his own money, and then on the same consideration made a deed of the same premises to his son, which, although if carried into complete effect would have been good between the father and son, yet would not have been good and valid against creditors; nor would it

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if retained incomplete in the hands of the father, have been good against a subsequent purchaser. Now had L. Ward taken a conveyance of the premises to himself, and then made a deed of conveyance to a third person, a stranger, without any consideration in fact, but expressing a consideration, and retained that deed in his own hands unrecorded, it would still have remained in his own power; he might have permitted it to go into effect, or he might have refused: Such third person could have no right, either in law or equity, to compel him to carry it into effect by delivering the deed, or by causing it to be recorded. I can see no equitable or legal distinction in the cases: the act in this case was equally *in fieri*, and the right of withholding the final effect the same. The circumstance, that in this case, the title was never so vested in the father, that merely by destroying or withholding the deed, he would retain or vest any legal title in himself, makes no difference as to his power over his voluntary act. It has already been seen that any right attempted to be derived from the property of the wife wholly fails;—that property being vested in full right in the husband: it fails as a contract between the father and mother who were *Baron and Feme*. A *Feme*, during her coverture, has no will of her own—no power of consent. Every contract between *Baron and Feme* is absolutely void. In this case the mother as a wife under coverture, derived from the supposed contract, no right against the father her husband; and surely, it cannot be contended that the son, as heir expectant to his mother, should, during the life of both father and mother, derive a right through her against the father, and that what was no right in her should spring up into a right in the son. If the father retained it in his power, he might still give effect to his former intentions, or he might on a Bill in Chancery submit, as he seems ready to do in this case, that it should be so decreed; but if the father had intentionally transferred the right, or suffered or procured it to be passed to a third person, although as it relates to the father he might have been defrauded or imposed upon, yet he alone would have a claim to redress. We cannot, on this bill, inquire whether it was done on a fair inducement, or whether obtained by fraud and imposition. It is sufficient that the father did now intend to exercise the power which he had to retain to himself the use, or rather the avails of the property, which he once intended for

the son. The circumstance that the title was never so in the father, that merely by giving up or destroying the deed made to the son, the property would either remain or become vested in him, makes no difference.

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It has been urged that the father might have been acting in two capacities—first for himself, in agreeing to make the contract for the son, and secondly as guardian, consenting for the son, and receiving the deed to his use, and so all his personal right and power over the property was gone. But this is not so.—He was still bound only to himself, and such self obligation, if I may use the expression, is nothing more than a revokable intention. Had he held the deed in his own power until the son came of age, the son could not have compelled him to deliver it up, or to have completed it to the use of the son, any more than though it had been a deed of his own property executed by himself and retained in the same manner.

The bill must therefore be dismissed, but without costs.

Robert Peaslee Administrator *de bonis non* of Zacheus Peaslee

vs.

William Barney Administrator of Udney Hay.

In Chancery.

No man can, either at law or in a Court of equity, set aside any of his contracts, because fraudulent on his part; nor can his heir set aside such contract; nor does his administrator, even in the case of an insolvent estate, so far represent the creditors, as that such contract can be set aside at his suit, but the creditors alone have a right to impeach and set aside such contract.

Chittenden, December, 1814.

THIS was a Bill of Review brought to reverse a decree of this Court, made in favour of the administrator of Udney Hay, against the administrator of Zacheus Peaslee. It appeared by the record, that William Barney, administrator of Udney Hay, deceased, exhibited his bill against Zacheus Peaslee in his life time, setting forth that Udney Hay in his life time, was seised and possessed of sundry large tracts of land situate in Underhill in the County of Chit-

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tenden, and, being so seised and possessed, did, on the 21st day of January, 1804, by his deed of that date, purporting to be for the consideration of $2000, convey to the said Zacheus Peaslee his heirs and assigns certain of the same tracts of land (described in the bill).—That on the 24th day of January, 1804, Udney Hay, in like manner by his deed of that date, purporting to be for the consideration of $1600, did convey to the said Zacheus Peaslee certain other tracts in said Underhill (describing them).—That on the 9th day of April, 1804, the said Udney Hay did in like manner convey to the said Zacheus Peaslee, his heirs, &c. by his deed of that date, purporting to be for the consideration of $—— the same tracts of land, as described in the deeds of the 21st and 24th of January.—And the bill charges that the whole of said deeds were given fraudulently, without any consideration, with intent to injure and defraud the creditors and heirs of the said Udney Hay. It was also alleged in the bill that the said Zacheus Peaslee held the said lands in trust for the said Udney Hay, and praying that the said deeds might be set aside and declared void, or that the said lands so held in trust might be conveyed to the Orator. Pending the bill, Zacheus Peaslee died, and the bill was revived against Sarah Peaslee, administratrix of Zacheus Peaslee, and after her death against Robert Peaslee administrator *de bonis non* of Zacheus Peaslee. The bill was exhibited January term, 1808. The decree recites the substance of the bill—the several revivals and continuances until January term, 1813, when the same was pronounced, without stating any plea or answer, or, in what shape the cause was heard, and concludes in the following words—"Therefore the Court, after a full hearing of the cause, do pronounce this their decree final, that is to say, the Court do declare, order and decree, that the following deeds, viz. (describing the deeds as above set forth) be annulled, vacated and held for nought, and that as well the said Robert Peaslee in his capacity of administrator *de bonis non* of the said Zacheus Peaslee, as the heirs of the said Zacheus Peaslee and all other persons claiming the said land by, through or under the said Zacheus Peaslee, the intestate, shall be forever enjoined from producing said deeds in evidence, for the maintenance of any title to the said lands by virtue of said deeds, and that the Orator have his costs."

The plaintiff in his bill of review, assigned the following errors

1st. That the administrator of Udney Hay was not competent to impeach the said deeds, as being fraudulent either against the creditors or heirs of Udney Hay.

2dly. That it does not appear in the bill or decree, that any creditor of Udney Hay, whose claims existed at the time of the execution of the said deeds, had ever exhibited any claim against the estate of Udney Hay, or that any of his creditors had been thereby in any way injured or defrauded.

3dly. That although it is alledged that Zacheus Peaslee held the said lands in trust for the said Udney Hay, it does not appear by the bill or the decree, that there was any declaration of trust in writing.

4thly. The decree is as well against the heirs, as against the administrator of Zacheus Peaslee, but the heirs were never made parties to the bill.

5thly. It does not appear by the decree that there was any answer put in to the bill, or any issue on which the cause was heard, or that the bill was taken *pro confesso*.

Mitchell, for the plaintiff in review.

Keyes, for the defendant.

CHIPMAN, Ch. J. delivered the opinion of the Court.

I shall first dispose of the 3d and 5th exceptions which have been taken to the decree under review. The 3d exception is, "That although it is alleged in the bill that Zacheus Peaslee held the said lands in trust for the said Udney Hay, it does not appear by the bill or the decree that there was any declaration of trust in writing." This exception we think is without foundation. It is true, it has been determined in the case of a bill for the specifick performance of a contract, required by the statute of frauds to be in writing, that unless it be stated in the bill, that the agreement was in writing, the defendant may demur for that cause. He may also plead that there is no agreement in writing, and it would be sufficient for the Orator to reply and prove a written agreement; but if the exception be not taken till the hearing, the defendant cannot object to proof of an agreement in writing, because not so stated in the bill, nor is it the course to set forth in the decree what evidence or proof was produced in the cause.

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The 5th exception is, "That it does not appear from the decree, that there was any answer to the bill—any issue on which the cause was heard, or that the bill was taken *pro confesso*." This is certainly an omission of the Clerk who drew up the decree, but it appears to have been merely an omission of the Clerk, that the case was heard on answer and traverse—upon proof. We think such omission may be supplied if necessary, in a case like the present, which we do not decide, from the files and entries in the original cause, and that when the error alleged arises from a mere omission or misrecital through the negligence or mistake of the Clerk who drew up the decree, the Court will look into the files in the case to supply and correct it.

The other exceptions raise some very important questions, particulaly, the first exception.

The principal question is, whether it would be competent to the administrator to impeach and set aside an act done by his intestate in his life time for the fraud of the intestate himself. Let us inquire what is the situation—what the rights and duties of an administrator. To all the purposes of the settlement of the estate, he represents the intestate. To that end, under the direction of the law, he has the disposal of the estate—he represents the intestate in all claims and rights beneficial to the estate, which the intestate himself had, or which were accruing. And with respect to the estate coming to his hands and possession, he represents the intestate in his liability to all legal claims and demands of others, except in certain special cases of tort, in which it is a maxim *Actio personalis moritur cum persona*. No man can, either at law or in equity, nor can his heirs, set aside any of his contracts because fraudulent on his part. And that which was never a right in the intestate, can never become a right and attach a remedy in the administrator. It is true, as has been argued, that a man, if defrauded by others, may have his remedy either in law or equity, and obtain relief according to the nature of his case; and the same right attaches in the administrator in virtue of his representative character; but the distinction between the cases is too obvious to need illustration.

It has been argued, that by our law, the administrator represents not only his intestate but his creditors also, especially where the estate is insolvent, he represents the intestate who is the debtor, and

certainly the law cannot be construed into such an absurdity, as to vest in the same person and character in respect to the same subject, the conflicting rights and duties both of debtor and creditor: there is nothing in any law to countenance such a notion.

But the case is not without a remedy. The creditors who have been injured by the fraudulent act, may have a remedy to restore the estate fraudulently withdrawn, or encumbered in the hands of other persons, to the proper fund for the payment of debts. For this purpose, any creditor may bring a bill in behalf of himself and other creditors, against the party to the fraud, or against those who have the estate fraudulently in possession. In such case, the administrator, instead of being a party plaintiff, must be made a defendant, that he may by the decree be compelled to proceed with the estate recovered in the payment of the debts in a due course of administration. But the relief extends no farther. A creditor, at common law, may have his action against the person so fraudulently holding the property, charging him as executor *de son tort*. This, however, if not superceded by our law, could be but a partial and inconvenient remedy. But every person may, by act to take effect in his life time, or, by last will and testament, dispose of all, or any part of his property to others; and, whatever may be the strict moral character of such act, the law does not consider any injury done to the heirs or next of kin. But the creditors have, in respect of their debts, a general lien upon the property.

These principles established, put out of the present case, the question intended to be raised, under the second exception, whether it ought not to have been alleged in the bill, that there were creditors of Udney Hay, the intestate, who were injured by the fraud. Certainly, if there were no creditors, no body was injured; but if there were creditors, it was for them and not the administrator to pursue the remedy.*

I will further observe, that the bill and decree in this case, seem to have gone, at least in part, upon a principle totally inconsistent with that full dominion and right of disposal which our law gives to every person over his property; and to suppose that every one is under some duty of perfect and legal obligation to preserve his property secure to those who may be his heirs. But this is not so.—

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* 7 Johnson's Rep. 161. Osborne *vs.* Morse. Cro. James, Haws *vs.* Leader.

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Peaslee *vs.* Barney.

Even as it respects children whose claim from nature is the strongest, the claim is contingent and subject to the dominion, control and disposition of the parents, either by act *inter vivos*, or by last will and testament: he may make an effectual gift of all his property without leaving any thing to his children, or he may dispose of it to and among his children, in any proportion or to any of them. And to his children and nearest heirs, it is a sufficient reason to say, such was my will and pleasure. The consequence of these principles is, the decree is erroneous and must be reversed.

J. FERRIS, E. FERRIS, J. HAVILAND and S. PEARSALL, Administrators of E. HAVILAND

vs.

FRANCIS CHILD and DANIEL FARRAND.

In Chancery.

A Bill supplementary to a Bill in Chancery, a Bill of Revivor, Bill of Review, or Bill to carry into effect a former decree, must be brought in the same County where the original suit was brought, and the proceedings are of record.

Chittenden, 1814.

THIS was a bill supplementary, to revive, amend and carry into effect a former decree of this Court, against Francis Child, made at St. Albans in the County of Franklin, December term, 1809, on a bill brought by J. and E. Ferris against Francis Child and J. Haviland, to be quieted and confirmed in their title to certain lots of land in Colchester in the County of Chittenden, which the plaintiffs had, before that time, purchased of Francis Child, and to have a deed from the said Francis Child to James Haviland set aside, as fraudulent.

The decree was against Francis Child only, that he should convey by good authentic deed to the plaintiffs, and procure to them a release of the premises from J. Haviland, by a day now long passed. Francis Child had not performed the decree, but had procured a deed of the premises from J. Haviland to Daniel Farrand, now made a defendant, in trust for him the said Francis Child. The plaintiffs had conveyed part of the premises to Ebenezer Haviland,

since deceased, and his administrators were joined with the plaintiffs in this bill. The defendants had answered, and the cause was heard at the last term of the Court in this County, and continued for consideration.

Chittenden, December, 1814.

Ferris et al *vs.* Child and Farrand.

By the Court. A bill supplementary, a bill of revivor, review, or for varying or carrying into effect a former decree, must be bro't in the same County where the original suit was entered and the proceedings are of record. The terms of the Supreme Court and Court of Chancery are holden for each County severally, and the records in each kept by a separate Clerk, and the records and proceedings of the Court, in any County, are before the Court in that County only. The proceedings in causes of this nature must be on record before the Court, which cannot be in another County. They may be compared to proceedings on a *scire facias*, to revive a judgment, or to have execution, which, it has always been holden, must, if before the Supreme Court, be brought in the same County where the original judgment is of record. To adopt a different practice would occasion great difficulty and inconvenience. With us, the records cannot be removed—a transcript only can be had. It frequently becomes necessary to examine the original files and records.

There can be no justifiable reason for permitting a practice so inconvenient and unprecedented.

The bill must therefore be dismissed, but without prejudice.

Addison, January, 1815.

DAVID PAGE, JR. *vs.* JAMES JOHNSON et al.

If an appeal be entered from a judgment rendered by a County Court, to the Supreme Court, and the appellee recover judgment in the Supreme Court, although for a less sum than he recovered in the County Court, it is an affirmance of the judgment of the County Court, within the meaning of the condition of the recognisance for the prosecution of such appeal

It is not necessary for the appellee in such case to take out execution on the judgment, in order to charge the bail on their recognizance.

In a declaration on such recognizance, it is necessary for the plaintiff to aver that the defendants have not answered, or paid the intervening damages and costs

THIS was a *scire facias* brought on a recognizance entered into before the County Court, by the defendants, on an appeal from a judgment rendered in that Court, August term, 1811, in favour of the plaintiff, David Page, Jr., against J. Johnson, one of the defendants. The condition of the recognizance was, that J. Johnson should prosecute his appeal prayed out, at the next term of the Supreme Court, &c. to effect, or answer and pay all intervening damages and cost, in case judgment should be affirmed.

The *scire facias* set forth, that J. Johnson entered his appeal at the then next term of the Supreme Court, and suffered judgment by default, and damages were assessed at $1386, 37, and judgment was entered for that sum, and for $26, 75 costs of suit (the judgment in the County Court was for $2154.) The plaintiff took out execution therefor, and delivered the same to the Sheriff of the County, who made return thereon, that he had made diligent search for goods, chattels or estate of the said J Johnson, whereof to satisfy the said execution, but could find none except the amount of $144 50, and that, by direction of the plaintiff, he forbore to commit the body of the said J. Johnson to prison thereon, and therefore returned said execution, not satisfied except as to the sum of $144 50. The defendants demurred to the declaration in the *scire facias*. The County Court thereon rendered judgment for the plaintiff; from which the defendants appealed to this Court.

Seymour and *Doolittle*, for the plaintiff.

D. Chipman, for the defendants.

The counsel for the defendants contended,

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1st. That the condition of the recognizance prescribed by the statute, is, that the appellant shall answer and pay, in case or provided the judgment was not affirmed, as the plaintiff, on the appeal, recovered a less sum, it was a different judgment—not an affirmance of the former judgment.

2dly. That the plaintiff had, from his own shewing, been guilty of neglect. He had not merely neglected to charge the appellant, J. Johnson, in execution, but had directed the officer not to commit him.

3dly. The breach is not well assigned. The condition is in the alternative, that the appellant prosecute his appeal to effect, or answer and pay all intervening damages and costs. It is sufficient if either part be performed. The plaintiff has set forth certain facts, from which he would draw the conclusion, that neither part of the alternative has been performed; but the facts do not warrant such conclusion, especially as to the latter part of the alternative. There is no direct averment, that the defendants have not paid all intervening damages and costs.

On the part of the plaintiff, it was contended, that the recovery of any sum by the plaintiff on appeal, was so far an affirmance of the judgment, and that, from the return of the officer, it appears that the plaintiff had not, and could not obtain satisfaction for his damages and costs. The condition is, that he should be paid—not that he should have the body in execution.

CHIPMAN, Ch. J. delivered the opinion of the Court.

As to the first exception taken on the part of the defendants, the construction has always been as stated by the plaintiff's counsel.—If the appellee again recover on the appeal, it is an affirmance of the former judgment, fully as to the right, and partially as to the *quantum* of damages. It was unnecessary for the plaintiff to set forth the taking out of an execution at all: it would have been sufficient to have stated, generally, that he had been delayed and put to great damages and costs. He might have averred the insolvency of Johnson, and that he could not obtain satisfaction of his judgment. But an averment that Johnson had not answered and paid, is in such case indispensable. Instead of this, the plaintiff has set forth certain facts from which we are to draw the conclusion, that Johnson the appellant has not answered and paid, &c. The facts are,

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that the plaintiff recovered judgment—took out execution, and put it into the hands of a proper officer, who returned, that he could find no goods, chattels or estate of Johnson, whereof to satisfy the execution, except as to a small part: Hence, it is deemed a fair conclusion, that J. Johnson has not answered and paid the intervening damages and costs sustained by the plaintiff. It certainly amounts to nothing more than this, that a partial satisfaction, only, had been obtained on the execution, but it affords no legal conclusion, that full satisfaction had, at no time, been obtained or made. There should have been a direct averment, that J. Johnson had never answered and paid the intervening damages and costs. The breach is not well assigned. There must, therefore, be

Judgment for the defendant.

BROOKS *vs.* PAGE.

A note payable in specifick articles may be declared on as a specialty, or promissory note, under the 3d and 4th of Anne. The plaintiff is not required to state in his declaration a consideration, nor to produce evidence on trial to prove a consideration, except to rebut evidence, produced on the part of the defendant to prove a want of consideration. But, it is necessary for the plaintiff, to make all other averments, as in a declaration on a verbal contract.

In a declaration on a note for the payment of $100 27 at the defendant's dwelling house in Middlebury, on the 1st day of June, 1812, in horses, to be appraised by three men, the plaintiff averred, that the defendant had not performed, though often requested, to wit, at Middlebury, on the 1st day of June, 1812. The Court held that this did not amount to an averment, that the defendant was at the dwelling house of the defendant in Middlebury on the 1st day of June, 1812, ready to receive payment.

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THIS was an action of *assumpsit* on a note. The declaration is "In a plea of the case for this, to wit, that whereas the defendant, at Middlebury in the County of Addison aforesaid, on the 20th day of December, 1811, did make, execute and deliver to the plaintiff his certain note in writing, commonly called a promissory note, subscribed with the proper hand of him the defendant, in and by which the defendant promised the plaintiff, for value received, to pay him the sum of $100 27, at his the defendant's dwelling house

in Middlebury, on the 1st day of June, 1812, in horses, to be appraised by three men. Wherefore the defendant became, was and is liable in law to pay to the plaintiff the said sum of money in said note specified, according to the tenor of said note; and so being liable as aforesaid, did in consideration thereof, to wit, at Middlebury aforesaid, on the 20th day of December, 1811, aforesaid, assume upon himself and to the plaintiff faithfully promise to pay to him the said sum of money in the said note specified, according to the tenor of said note. Nevertheless, the defendant, his promise and assumption aforesaid not regarding, hath not performed the same, though often requested, to wit, at Middlebury, on the first day of June, 1812."

The defendant demurred to the declaration.

D. Chipman, in support of the demurrer, contended, that the writing on which the plaintiff in this case has declared, is not known in law as a promissory note. Promissory notes must be for the payment of money only; they were introduced by the statute of the 3d and 4th of Anne; but that statute extends to notes for the payment of money only. Under that statute, the present mode of declaring on them was introduced, in which the acknowledgement of value received, is considered equivalent to an acknowledgement of a sufficient indebtedness, inducing a liability on which to raise a promise. It does not extend to other written agreements, although drawn in the shape of promissory notes, for value received. Such agreement must be declared on as a special *assumpsit*, and the consideration and express promise must be set forth. The law does not in this case raise a promise, on an implied liability arising from a general consideration, but from the actual and specifick consideration passing between the parties. But if this mode of declaring on such written agreements be permitted, the declaration must contain all the averments necessary in a special *assumpsit*, for the same cause. The agreement here is for the prformance of a collateral act, and not for the payment of money; for the delivery of horses, at a certain time and place, to a certain value to be ascertained by appraisement. The plaintiff should have averred that he was ready at time and place to receive the horses, if not to agree on the appraisers who are not named in the agreement. The plaintiff must aver every thing necessary to be done on his part. 1 East.

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Rep. 203, Laughton *vs.* Johnson. 7 T. R. 125, Morton *vs.* Lamb. 1 Chit. 304.

Edmond, for the plaintiff, contended that such written agreements for value received, had in this State, always been considered as promissory notes, and declared upon as such, and the present declaration is in the usual form of declarations on such notes; that this is, in effect, a note for the payment of money, and is so expressed, although the maker is indulged in making payment in horses. If the horses are not delivered, the sum of money therein expressed, is the real demand of the plaintiff, the debt owing by the defendant. Had the declaration set forth the consideration, and the promise to deliver the horses, as on a special contract, all the averment necessary would have been that the plaintiff was ready on his part at the time and place to receive the horses, and this is substantially though not formally set forth in the declaration. It is contained in the declaration, that on the first day of June, 1812, the day on which payment was to be made, at Middlebury where payment was to be made in horses, the defendant was requested to perform his promise as expressed in the note. Now if the plaintiff made the demand of the defendant, it is conclusive that he was present ready on his part to receive the payment.

CHIPMAN, Ch. J. delivered the opinion of the Court..

The form of the declaration on note was first introduced into our Courts from the practice in Connecticut. It was, and I believe still is the practice in that State to declare on a note of hand as on a specialty, and to make a profert of the note. After setting forth the date of the note, the declaration expresses the cause of action as concisely as on bond—in and by which said note, the defendant promised the plaintiff, for value received, to pay to him, if for money, if for some collateral act or thing—to deliver, do or perform according to the contract expressed in the note; concluding with a breach of promise, either general or special, and such averments as the nature of the case requires. The promise is stated as made expressly on the general consideration for value received—no liability or promise in law is raised, and no distinction is made between notes for money and those payable in specifick articles.

The principal—perhaps the only objection to this mode is, that

it departs, in a degree, from analogy, and the application of principles and precedents is some times less obvious. From this consideration, or perhaps for the convenience of deriving practical forms from the same source from which have been derived the maxims, principles and precedents of our law, and the rules by which they are applied to the decision of cases as they arise, the English form of declarations on promissory notes has been pretty generally adopted in our Courts; but without regarding the distinction made by the English law between promissory and other notes; nor did the English lawyers attend fully to this distinction. Promissory notes embraced in the 3d and 4th of Anne, are such only as are made payable to order or bearer, and for money: such notes are put on the footing of inland Bills of Exchange, and the declaration was framed, as will be easily seen, on that analogy, the same analogy was extended to notes not payable to order or bearer, and consequently, not within the statute of Anne, provided they were payable in money only. With us, the analogy has been farther extended, to all contracts in the form of promissory notes, whether for the payment of money, or for any other act or thing, or in other words, to those notes which in the English law are considered special contracts, and declared on as such. In supposing an indebtedness in order to raise a liability and promise, as it relates to this latter class of notes, there may be a technical impropriety; for in a technical, legal sense, at this day, a man is holden to be indebted for nothing but money. It was not so however by the ancient law; an action of debt was the most usual action on an agreement to pay or deliver any thing specifick, either in number, weight or measure, as for ten marks of silver, a quarter of wheat, ten sheep. &c. At this day, nothing is considered as a debt, in a technical legal sense, but what is to be paid directly in money, as money is the general medium of payment. When, therefore, one person receives any thing of value of another, as goods, &c. to be paid for thereafter, unless a special contract be proved for some other satisfaction to be made therefor, the law decides that payment shall be made in money, the general medium. Thus if a person receive any thing of another—any thing to be paid for generally, he is, in a proper and legal sense, indebted to that other, for so much money as the thing received is worth, or so much as has been agreed by the parties. In law and

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justice he becomes liable for the payment, and on that ground, the law presumes from the liability or obligation, a promise to pay, and hence, the action of *indebitatus assumpsit*. There is a perfect consistency through the whole: the liability is commensurate with the value of the thing, or the price agreed on The promise which the law therefore raises is commensurate with the liability, which, in this case, the law makes the consideration of the promise. The declaration on a promissory note was formed in analogy to the *indebitatus assumpsit;* it differs, however, in the manner of raising the liability.—In a general *indebitatus assumpsit*, it is necessary to set forth generally, for what the defendant is indebted as for money had and received, goods sold, work and labour done, &c. But on a promissory note it is sufficient to say, that the defendant promised for value received, which is in lieu of being indebted for money, &c. on which the liability and the promise to pay is raised. In the *indebitatus assumpsit*, the consideration on which the indebtedness is raised, must be proved according to the allegation, whatever it be; but in a declaration on a promissory note, the allegation for value received is deemed sufficient, nor is it necessary to prove the specifick consideration which passed to the maker of the note although a want or failure of the consideration, or an illegal consideration may be proved by the defendant.—This distinction was first introduced and supported in favour of commerce—first upon bills of exchange, and then extended to promissory notes; for, as bills and notes supply an extensive medium of trade, and have a wide circulation, it would often be very inconvenient or even impossible in an action on a bill or note to prove the specifick consideration, on which it was given; in almost every other respect, the action on a bill or note agrees in form and principle with the general *indebitatus assumpsit*. We may here observe, that a bill of exchange contains no express promise between the parties, in any stage of negociation; the promise is implied, on the value received, from the general usage which is the foundation of the common law; it is the same with a promissory note in the hands of an indorsee or bearer, but to raise a promise by implication between the maker and payee of such note, which contains an express promise, is mere tautology and sanctioned only by custom. When we consider the nature of a special contract, and examine the declaration on a prom-

issory note, the reason and analogy in some degree fail. In a special contract the party does not resort to the general indebtedness or liability implied in law, as a consideration to support the promise, but relies directly on the consideration expressed in the agreement, and the express promise thereupon to deliver the particular thing or perform the particular service, with the time, place and condition as specified in the agreement, so far as it is material, for the law considers such agreement made on good consideration, as imposing an obligation to perform the promise. This obligation is made to arise, not from any implication of law, but from the express stipulation of the party, which excludes all implication; the promise is just what is expressed in the contract—nothing more or less, and ought to be so declared upon; not in the very words of the contract, but according to their legal import. The note in this case contains a special contract; it is not a contract for the payment of money, but for the delivery of horses, to a certain value, to be ascertained in a particular manner, by appraisement: Such is the true and legal import of the expression, "to pay $100 27 in horses."—The declaration, therefore, ought, agreeably to the English forms, to have been special, and to have set forth the consideration, at least as specially as the general *indebitatus assumpsit*, and ought also to be proved in the same manner.

The Court are, however, on full consideration, of opinion, that there is no more impropriety in so declaring on these instruments, than on promissory notes, so called in the English law, and, in holding the words 'value received,' adopted by the parties for that purpose, as *prima facie* proof of a good and sufficient consideration, and to supercede, in that respect, the necessity of special proof. Indeed, from the frequency of this species of notes, the same reasons of convenience ought to prevail as in the case of bills of exchange and promissory notes for money; but, as to the promise and non-performance, the declaration must be special, and contain all averments necessary in like cases on special contracts.

As to the second objection, the want of an averment that the plaintiff was ready, at the time and place of delivery, to receive the horses, it is agreed by the counsel, that such averment is necessary, in this case, and it is contended on the part of the plaintiff that this declaration contains such averment in substance, though not in

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was the general agent of the father, and who communicated such notice to him previous to any notice of the present suit, was sufficient to bind him in equity to make the payment to J. W.—That it was not necessary, when called upon as trustee, that he should swear that the sale of the notes to J. W. was *bona fide*. Had he been interrogated, he must, if he knew of any collusion, have disclosed it; but here was no such interrogatory, and certainly we are not to presume collusion, nor does it appear just that he should, in this case, be affected by any collusion between Adams and J. W. of which he had no knowledge. The Court, therefore, affirmed the decision of the County Court, that Lampson was not the trustee of Adams.

ELISHA ASHLEY *vs.* JAMES HARRINGTON Administrator of THEOPHILUS HARRINGTON.

In construing the revised laws of 1797, they are not to be considered as prior and subsequent acts, but as establishing a system of statute law—as parts of the same law,

By the provisions of the 73d and 74th Sections of the Judiciary Act of 1797, and the 86th and 89th Sections of the Probate Act of 1797, in case of the decease of a party defendant, pending a suit, the plaintiff, if the cause of action doth by law survive, is empowered to proceed to final judgment against the executor or administrator, although the estate be represented and found insolvent.

ELISHA ASHLEY commenced an action of *assumpsit* on a promissory note against Theophilus Harrington, in his life time, before Rutland County Court, at November term, 1813, to which action Theophilus Harrington appeared and had a continuance until March term, then next, and afterwards on the —— day of December, 1813, deceased; and James Harrington was regularly appointed administrator on his estate: and the cause of action by law surviving, the plaintiff, Ashley, took out a *scire facias* and cited James Harrington, the administrator, to appear and defend in said action, at the next term of said County Court, in March, 1814; at which term the said administrator appeared, and obtained a continuance of said cause to December term, 1814.—At which term the defendant pleaded in bar, that the plaintiff ought not to have or maintain

his said action thereof against him the said James, administrator, &c. because he says that on letters of administration being granted to him, of said estate on the 2d Monday of December, 1813, supposing said estate to be insolvent, he represented to the Judge of Probate, for the District of Rutland, the circumstances and condition thereof; upon which representation, the Judge of Probate appointed O. F. J. E. and C. J. commissioners to receive, examine and adjust the claims of the creditors to said estate; and the said commissioners having given due notice according to the statute and the directions of the Judge, received and examined all claims exhibited to them against said estate, and made report of their doings to the Judge of Probate, returning two lists of the said claims—one list of all the claims by them allowed, and one other list of all the claims which had been presented and disallowed, which report the Judge of Probate accepted, at a Probate Court holden at Rutland, &c. on the 10th day of December, 1814, averring that this action was not brought for the recovery of any debt due for rates and taxes, for expenses of the last sickness, or for funeral charges; and that the administrator had never consented that the plaintiff's demand should be settled in a course of law, and prayed judgment, &c. To which plea the plaintiff demurred.

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Langdon, in support of the demurrer, contended that this cause must be governed by the 73d Section of the Judiciary Act, which provides that when any suit is pending in any Court of Record in this State, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner or defendant, if the cause of action doth by law survive, shall have full power to prosecute or defend such action. It then gives the plaintiff a *scire facias* to cite the executor or administrator to appear and defend in such suit. The 86th Section of the Probate Act, which enacts that no action shall be sustained against the executor or administrator of an insolvent estate, except in certain cases therein specified, unless the executor or administrator consent to have a trial at law, must be taken in connexion with the 89th section—"That all actions brought against any executor or administrator before any estate is represented insolvent, shall, when such estate is found to be insolvent, be discontinued, except as in the 86th Section," so that it extends to those actions only

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which may have been commenced against the executor or administrator, not to those which had been commenced and were pending at the time of the decease of the testate or intestate; and so the plea is not sufficient to bar the plaintiff's right to proceed to final judgment.

Williams, for the defendant, contended that the 73d Section of the Judiciary Act, cited by the plaintiff's counsel, is, on a fair construction, limited by the 89th Section of the Probate Act, to actions pending in cases of insolvent estates. Any other construction would evidently break in upon the system, so particularly provided by the Probate Act, for the settlement of insolvent estates. It was clearly the intention that all demands against such estates should be adjusted by one rule, and the same board, the commissioners to be appointed for that purpose; with a right of appeal, in certain cases, and that the whole by the award of the commissioners should come before the Judge of Probate in one view, that he may be enabled to make and order a dividend of the avails of the estate, in due proportion, to and among the creditors. To effect this purpose, is the great object of the 86th and 89th Sections of the Probate Act.—The 86th Section provides that no actions, unless in the cases excepted, of which this note is one, shall be commenced. The provision is, that no action, wherever it might have been commenced, whether in the life time of the testate or intestate, or against his representative after his decease, shall be sustained. And the 89th Section provides that every such action pending, shall, on the estate's being found insolvent, be discontinued. He contended that on any other construction one creditor would be found pursuing his remedy in one Court, and another in another Court—others before the commissioners, which would derange the whole Probate system;—that the plea was, therefore, sufficient to bar the plaintiff of his remedy in this action.

CHIPMAN, Ch. J. delivered the opinion of the Court.

The Probate law was intended by the Legislature, for the just, equitable and expeditious settlement of estates, both solvent and insolvent; and in all decisions that may affect it, the spirit, intent and end of that system ought to be kept steadily in view. The case now under consideration, is that of a suit pending at the death of the

intestate, and is distinctly provided for in the 73d and 74th Sections of the Judiciary Act; and here we must look for the rule of decision in this case, unless we find some express provision in the Probate Act, which limits or modifies the provision contained in these sections, in such manner as to exclude from it all actions in the circumstances of the present action.

In giving a construction to the revised laws we are not to consider them as prior and subsequent acts, but as intended to form one general system of statute laws. If we consider them in this light, we shall generally find all seeming repugnancies easily reconciled. The 73d Section of the Judiciary Act, in its expressions, clearly embraces every action pending at the decease of the party plaintiff or defendant, which by law survives, without regard to the solvency or insolvency of the estate of the deceased. In the 74th Section immediately following, the case of insolvency is contemplated, as requiring a modification of the provision in the preceding Section, and such modification is introduced, clearly with a view to the Probate system. Accordingly the last mentioned Section provides "That when final judgment shall be recovered as aforesaid, (referring to the provision of the former Section) against an estate represented insolvent, execution shall be stayed until a full and complete settlement shall be made of such estate, in the Probate office; and the party shall take out execution, for no more than his, her or their just proportion and dividend out of such insolvent estate, agreeably to the settlement of said estate in the Probate office." Taking these two Sections in connection, there cannot be a doubt, that in an action pending at the decease of the party defendant, the plaintiff, if by law the action survive, is empowered to proceed to final judgment against the executor or administrator, although the estate shall be represented, and finally found insolvent. It is the very case for which provision is made in the latter Section, with a view of adapting it to the provisions of the Probate system; and such is the effect of the construction of the 86th and 89th Sections of the Probate Act, for which the defendant's counsel contend. Now it is a sound rule of construction, that all acts and parts of acts, forming one system, shall be so construed, as to give to every part and every provision its intended effect; and where there may be found any conflicting provisions, so far only to restrain either,

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keeping in view the general intention, as to render the whole consistent. In order to a clear understanding of the 86th Section of the Probate Act, it must be taken in connexion with the 89th Section; both make but one complete provision on the same subject. The expression in the 86th Section, "That no action shall be sustained against an executor or administrator of an insolvent estate, unless in the excepted cases," is sufficiently broad to comprehend all actions, as well those pending at the time of the decease of the party defendant, as those afterwards commenced against his executor or administrator, if so required to render it consistent with the other provisions of the law. The 89th Section is but a farther provision pointing out the mode in which final effect is to be given to the 86th Section. This is very definite in the expression, it is "that all actions brought against any executor or administrator of any estate, which is represented insolvent, shall, when such estate is found insolvent, be discontinued, unless the executor or administrator consent to have a trial at law, as before directed in this Act." This clearly does not extend to such actions as are pending at the death of the testate or intestate, and revived against his executor or administrator, but to those actions only, which have been brought or originally commenced against the executor or administrator.—This construction will give effect to every Section of the Judiciary and of the Probate Act, upon this subject.—It will not, as has been urged, produce any inconvenience, or any derangement of the Probate system. Under the provisions of the Probate Act, there may be trials and judgments at law; there may be appeals to this Court from the awards of the commissioners; such awards may, by the Court, be varied, reversed or affirmed, and the final awards and judgments must be returned to the Judge of Probate. So, if in an action like the present, revived against the executor or administrator, the creditor recover final judgment, he must cause the amount recovered to be certified to the Court of Probate, or he cannot have the effect of that judgment; for the Court are to stay the execution until a settlement of the estate shall be made in the Probate office, and then he is to take execution for no more than his just proportion and dividend of the estate: the Court will not suffer execution to issue until he shall have produced a certificate from the Judge of Probate, of the sum allowed for his dividend, nor will the Judge of Probate allow him a dividend, unless he shall have returned the

amount of his judgment to be added to the list of claims against the estate; and thus the Probate system is preserved entire. Upon any construction of the Act, however, this is not a good plea, nor is the mode proper, were it decided to be a case coming within the 86th Section of the Probate Act, and that a plea in bar might be proper in this case; for the provision, be it what it may, extends to cases only of estates that are found insolvent; but the plea does not suggest that the estate has been found insolvent—it alleges only that it has been represented insolvent. Had there been such averment in the plea, still the mode is improper; it is directed that all actions coming within the 86th Section of the Probate Act, shall, when the estate is found to be insolvent, be discontinued: this must be done on motion to the Court. I do not know of any plea which concludes in discontinuance. In no point of view can the plea be supported. There must, therefore, be

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Judgment for the plaintiff.

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The clause in the statute of limitations, limiting the time for bringing an action of debt or *scire facias* on judgment to eight years, does not extend to a *scire facias* provided by the 9th Section of the Act directing the serving and levying executions, in a case where an execution has been levied on property which did not belong to the debtor.

In such *scire facias* it is necessary for the plaintiff to aver, and, on trial, to prove that the property on which the execution was levied, did not belong to the debtor.

THIS was a *ccire facias* brought before the County Court to have execution on a judgment, rendered in the County Court for Rutland County, on the third Monday of November, 1803, for the sum of $125 93 damages and costs. The *scire facias* set forth the judgment, and that, on the 25th day of October, 1804, the plaintiff took out execution thereupon.—That on the 11th day of November, 1804, he caused the same to be levied on a certain lot of land situated in the town of Randolph in the County of Orange, (the lot described by metes and bounds) as the property of the de-

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fendant S. Tucker.—That after the levy of the execution, as aforesaid, the plaintiff let the lot of land by lease to J. R. of the City and State of New-York, for a term of years (without a date of the lease, commencement or end of the term).—That J. R. during the term, to wit, at the October term of the Circuit Court of the United States, holden at Rutland in and for the District of Vermont, on the third day of October, 1807, commenced an action of ejectment against F. K. of said Randolph, then in possession of said lot of land, claiming to be the lawful owner thereof; and such proceedings were had in said action, that at the term of the Circuit Court, begun and holden at Rutland aforesaid on the said third day of October, 1808, the said J. R. plaintiff in that action became nonsuit, whereby, &c. supplicating a remedy.

The defendant in the Court below pleaded the statute of limitations, that the plaintiff's action was not commenced, within eight years next after the rendition of the judgment, to which the plaintiff demurred, and judgment was thereon rendered for the defendant, from which judgment the plaintiff entered an appeal to this Court.

Page, for the plaintiff.

Williams, for the defendant.

In support of the demurrer it was contended, that this is not a case within the statute of limitations.—That, at least, it is within the equity of the saving clause.—That it is not the common case of a judgment, which has been suffered to lie dormant for eight years, from which might arise a presumption that it has been paid and satisfied, but the plaintiff has endeavoured to obtain satisfaction; he took out execution within a year after the rendition of the judgment, and caused the execution to be levied on, and, supposed to be the property of the defendant.—Four years after the levy, it was legally made to appear, that this land was not the defendant's property. Five years after the rendition of the judgment, and four years after the levy of the execution, it was first discovered that the levy was made by mistake—that the plaintiff had in fact obtained no satisfaction, the land having been proved not to have been the property of the defendant at the time of the levy, but of another person. When this appeared, the plaintiff's right accrued, under the statute "directing the serving and levying executions" to have a *scire fa-*

cias to obtain an alias writ of execution on that judgment. Suppose the failure of title had not appeared until the year 1812, more than eight years after the rendition of the judgment, it would be very hard to say the plaintiff is barred of his remedy before his right to that remedy had accrued.

For the defendant, it was contended that the expressions in the statute are general, positive and without any exception, "that all actions of debt, or *scire facias*, on judgment, shall be brought within eight years next after the rendition of such judgment, and not after." As the statute makes no exception, the Court can make none. It is at the risk of the creditor to discover the defect of title in due time for his remedy.

CHIPMAN, Ch. J. delivered the opinion of the Court.

If the statute of limitation is, as contended by the defendant's counsel, a peremptory bar in this instance, it is certainly a very hard case and contrary to equity. The Court however are of opinion, that the statute of limitations in the clause relied upon contemplates only the case of a judgment, which has been suffered to lie dormant eight years—no satisfaction appearing of record. The law goes on the presumption that a judgment would not have been suffered to lie so long unsatisfied; it presumes that the judgment had been paid and satisfied by some arrangement between the parties, but through neglect not entered of record, which, after so long a time elapsed it would be difficult to prove, by such evidence as the law requires. This principle applies to a case, where, at common law, the plaintiff might have his remedy by action of debt or *scire facias qua. executionem non.* Such is not the case under consideration; the plaintiff could not have the common law remedy, either of debt or *scire facias*. By the return of the execution the judgment appears on record to be satisfied; to a plea of this in bar, the plaintiff could, in such case, make no sufficient replication: so that he was, at common law, without a remedy; yet there can be no doubt that in an equitable view of the case, he is entitled to be provided with a remedy, and this remedy is given by the statute directing the serving and levying executions. The 9th Section of that Act provides, that when it shall appear that the property, on which the levy or extent had been made, for satisfying an execution, did not belong to the debtor, the creditor shall have a *scire facias*

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against the debtor requiring him to appear and shew cause why he the creditor should not have an alias execution on his judgment; and, if no sufficient cause be shewn to the contrary, that he shall have an alias execution accordingly. This is a new remedy given by the statute, which has adopted and applied the common law writ of *scire facias qua. extentionem non*, which alone was contemplaed in the statute of limitations, to a new case. The creditor's right to this remedy accrues upon the happening of some event, by which it can be made legally to appear, that the property or estate, on which the first execution had been levied, did not at the time of the levy belong to the debtor, in consequence of which the creditor has lost his satisfaction; but this very often may not happen until a much longer time than eight years has elapsed after the rendition of the judgment; so that, agreeably to the defendant's construction of the statute of limitations, the creditor's right would very frequently be intercepted and prevented before it could accrue. This iniquitous absurdity is prevented by giving a just and proper construction to the statute of limitations on this subject, by confining it to the case of a *sciere facias qua. ex. non.* at common law, which supercedes all necessity of imagining an equitable saving to prevent injustice. But it is farther insisted by the defendant's counsel, that the plaintiff has not in his *scire facias* set forth matter sufficient to bring his case within the statute on which he relies—that he has not made a case to entitle him to an alias execution. To be sure, if the plaintiff undertake to set forth facts from which to draw a conclusion of his right, and the facts do not warrant that conclusion, he must fail. In this case, the plaintiff, after having set forth the levy of his execution on the lands described, goes on to state that he let the same lands by lease to J. R. for a term of years, but gives neither the date of the lease, the number of years, nor the commencement or end of the term; nor, indeed, whether by writing or parol. He farther says that J. R. during the continuance of the term, commenced an action of ejectment, before the Circuit Court of the United States, on the third day of October, 1807, for the recovery of the same lands against F. K. who was in possession claiming title; and that such proceedings were had, that at the Circuit Court of the United States holden at Rutland, in and for the District of Vermont, on the third Monday of October, 1808, J. R. the plaintiff in that

action, became nonsuit, whereby a right accrued to the present plaintiff, &c. Such is the substance of the case which the plaintiff has made—such are the facts from which is to be drawn the conclusion, that the debtor, the present defendant, was not the owner of the land, on which the execution was levied, and, certainly, the facts stated afford no such conclusion. For any thing that appears, F. K. the debtor might have derived a title from the present plaintiff, elder than that of J. R.; he might have been a mere trespasser—he might or he might not have claimed under an elder and better title, through Tucker the debtor. But whatever the title might be, no decision was had upon it.

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J. R. the lessee, abandoned and became nonsuit. From this statement it does not appear that the debtor was not, at the time of the levy, owner of the property, or that the plaintiff has not now a good title, under the execution. The proof in this case lies on the plaintiff—he cannot call on the defendant to make out the title. There must therefore be

Judgment for the defendant.

MOSES ROBINSON, Aaron Robinson, Samuel Robinson, Elijah Robinson and Fay Robinson, heirs of Moses Robinson late of Bennington, deceased, appellants from a decree of the Judge of Probate, for a distribution of the estate of said deceased, and also from a decree approving of said distribution and division.

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The following exceptions to the decree of the Court of Probate, taken by the appellants, with the decree of the Court thereon, will shew the points which were decided by the Court in this case:

And now the appellants, in Court by Daniel Chipman their Attorney say, That the said order or decree of said Judge of Probate ordering a distribution of said estate to and among said heirs; and also the order or decree of said Judge, approving of said division and distribution of said estate, ought to be set aside, vacated, and for nought held.

1st. For that the said heirs were not notified to appear before

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said Judge, nor had they or any of them an opportunity to make exception to said order of distribution.

2d. That said decree or order of distribution did not specify either the names of the heirs of said estate, or the sums advanced by way of settlement or otherwise to any of the heirs of said estate by the deceased in his life time, or the amount or proportion of said estate to which each heir was entitled, but left it for said committee to ascertain and decide.

3d. That said decree or order of distribution did not specify what part of the estate of said deceased was held in common with any other person or persons, or who such persons were, or what was the common interest of each, but left it to said committee to ascertain and decide; nor were any person or persons holding such estate in common notified of such order: yet said committee proceeded to divide certain estate which they stated was held in common with said heirs by David Robinson and others.

4th. That said committee did not set off or assign any part of said estate to the said Moses Robinson, one of the said heirs.

5th. That said committee set off to said Fay Robinson one of said heirs, as a part of his share or portion of said estate, a certain tract of land in Addison in the County of Addison, which had been sold by said deceased in his life-time to David Whitney of said Addison, but which had not been conveyed; and which the Judge of Probate has ordered the administratrix on said estate to convey to said Whitney, in pursuance of said contract.

6th. That Nathan Robinson, deceased, son of said Moses Robinson, deceased, had received of said Moses in his life-time, three thousand dollars, which sum said committee of distribution did not deduct from the share of said John S. Robinson, son of said Nathan, as by law ought to have been done.

7th. That said committee of distribution in setting off the share of said John S. Robinson, only son and heir of said Nathan Robinson, did set off to said John S. a portion of said estate of a greater value, by five thousand dollars, than what by law he was entitled to.

8th. That the manner and form in which said estate has been divided, by said committee, to and amongst the heirs of said estate, is so uncertain and indefinite, that the several heirs cannot ascertain what portion or parcels belong to each.

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The Court having considered the orders of the Judge of Probate, the commission issued to the committee, &c. and the doings and return of said committee, and having heard counsel thereon do adjudge that the same are erroneous, in the following particulars, viz:

1st. That the Judge did not, before issuing the said commission for a division of the said estate to and among the heirs of said Moses Robinson, deceased, ascertain and declare who were the persons entitled as heirs.

2d. That said Judge did not ascertain and declare what advances had been made by said Moses Robinson in his life-time to any and each of the heirs entitled, &c. and the value of each advancement when made.

3d. The said Judge did not ascertain and declare what lands belonging to the estate of said Moses Robinson were holden in common or jointly with others, with whom, and in what proportion.

4th. That the said Judge did not, before the order for such partition, cause the several persons interested in the said estate to be notified thereof, that they might have opportunity to be heard upon the subject of the above particulars.

5th. That the said Judge did not ascertain and declare the lands and estate to be by said committee divided.

6th. That the said Judge did not ascertain and declare the shares and proportions and value to be divided and set to each person entitled as heir to a share in the division of said estate.

It is therefore considered by the Court, that the orders and decrees of said Judge of Probate be reversed, and the commission and the doings and return of said committee be wholly set aside and for nought held; and that the same be remitted to the Judge of Probate, and that he proceed to a division of said estate *de novo*, according to law.

Caledonia,
February,
1815

DAVID BROWN and others, Appellants,

vs.

ANNA BROWN, Appellee.

By the laws of this State, brothers and sisters of the half-blood inherit real estate, and take personal estate as next of kin to each other.

SAMUEL BROWN, late of Peacham, in the County of Caledonia, died intestate, leaving a widow, the Appellee, but no child, father or mother, or brother or sister of the whole blood; the appellants were brothers and sisters of the half-blood.

After the payment of debts there remained a surplus of said estate, both real and personal. The widow claimed the whole to be decreed to her for want of legal heirs, under the 73d Section of the Probate Act, by which it is among other things provided "That if such intestate, dying without heirs, leave a widow, the said Judge shall order, adjudge and decree to such widow the whole of such real and personal estate for ever, &c." By the 30th Section of the Probate Act, it is provided, "That if any person shall die intestate, after marriage, or, becoming of full age, without lawful issue, the father being alive; he shall be entitled to the whole estate of such intestate, unless he leave a widow; in which case, and also where no father be living at the time of the decease of such intestate, she shall be entitled to one half the real and personal estate for ever, after the payment of debts, &c."

The appellants, brothers and sisters of the intestate, of the half blood, claimed one moiety of the estate as next of kin to the intestate. The Judge of Probate decreed the whole of the estate to the widow, being of opinion that brothers and sisters of the half-blood, could not inherit or take as next of kin to each other. From which decree the brothers and sisters appealed to this Court.

John Mattocks, for the appellants.

William Mattocks, for the appellee.

CHIPMAN, Ch. J. delivered the opinion of the Court.

It certainly is a rule of the English common law, that brothers and sisters of the half-blood shall not inherit to each other—that, if a man die seised of an estate of inheritance, leaving a brother of the half-blood, but no heirs of the whole blood, the estate shall not go

to the brother of the half-blood, but shall escheat to the Lord, for want of heirs. This rule was derived from the Constitution of Feuds, which limited the descent to the heirs of the whole blood of the first feudatory. Where there were children, the eldest male took the whole real estate; if there were no children, the estate according to the rules of descent by which the heir was ascertained, often went to some remote relation, passing by those who were much nearer of kin. In this State it is provided by statute, that the real estate shall descend to all the children, and their legal representatives, if any be dead. And if the intestate have no child or children, at the time of his decease, such estate shall descend, equally to the next of kin, in equal degree, and those who represent them. And the father living is expressly placed in the first degree, agreeably to the civil law; whereas by the common law the father could not inherit to his child. By our law it is also provided that personal estate shall be distributed in the same manner to the next of kin; so that by our law the real and personal estate go to the same persons; whereas by the English law, they often took different directions.

In the Act for the settlement of testate and intestate estates, passed 8th March, 1787, are, among others, the following provisions—"And the remainder both of the real and personal estate, in proportion as aforesaid, to every of the brothers and sisters of the intestate, *of the whole blood*, and such as legally represent them: or, if there be no such kindred, then to the parent or parents of the intestate. And if there be no parents, then in proportion as aforesaid, to every of the brothers and sisters *of the half-blood* of the intestate: but, if there be no parent, brother or sister, then in proportion as aforesaid, to every of the next of kin to the intestate in equal degree, and those who legally represent them: kindred of the whole blood to take in preference to kindred of the half-blood in the same degree."

The framers of this statute seem to have had in view, both the common law of descent, and the English statute of distributions, enlarging the common law regulating the descent of real estate, by rendering kindred of the half-blood capable of inheriting, and restraining the provisions of the statute of distributions in favor of the half-blood, by postponing them to kindred of the whole blood.

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D. Brown et al. *vs.* A. Brown.

Our present statute, passed on the 10th March, 1797, which regulates the descent of real estate, giving the personal estate to the same heirs, has adopted the general principles, and in many instances the expressions of the English statutes of the 22d and 23d of Charles II. commonly called the statute of distributions. The framers of this statute had the English statute in view, and the construction which had been given to that statute.

About five years after the passing of the English statute, this point was decided in the Court of Common Pleas in favour of the half-blood in the case Smith *vs.* Tracy, 1 Mod. 209—2 Mod. 204. A man died leaving issue by two venters, three sons by the first wife, and two daughters by the second. One of the brothers died, and the eldest surviving brother took administration, and the Judge of the Consistory Court ordered distribution to the sisters of the half-blood. The administrator prayed a prohibition, but the Judges of the Common Pleas were unanimously of opinion with the Judge of the Consistory Court, and refused a prohibition. It was afterwards settled in the case Crocker *vs.* Watts, upon appeal to the House of Lords, that those of the half-blood should have an equal share with those of the whole blood. Indeed the question had long been virtually decided, in the construction of the statutes of Ed. III. and Hen. VIII. directing the Ordinary to commit the administration of the effects of a deceased intestate to the next of kin. Upon these statutes it had long been settled, that the brothers and sisters of the half-blood, were equally entitled to administration with those of the whole blood.

The present case, however, does not involve the question whether the half-blood stand in the same degree of kindred as brothers of the whole blood, but whether they are at all akin to each other. They have, indeed, as it respects each other, but half the blood of the common stock from which we are to reckon in this case. But, whether two persons are of kin to each other, does not depend on the quantity of common blood, but on their actual derivation from the common stock. Second, third and fourth cousins, are as really of kin to each other as father and child, but more remote in degree. Viewed in this light, it is unnecessary to resort to precedents to support the claim of the appellants; common sense and common feelings are sufficient to decide against every authority short of a positive law.

The Court, therefore, reverse the decree of the Court of Probate in this case, and order that distribution be made of a moiety of the estate of the intestate, to and among the appellants according to law. *Caledonia*, February, 1815.

SANDERS *vs.* HOWE.

In an action on a promissory note given by the defendant to the plaintiff, in satisfaction of an injury done the plaintiff, by the circulation of false reports, injurious to the character of the plaintiff's wife, supposed to have been put in circulation by the defendant, parol evidence is admissible to prove that at the time of giving the note, the plaintiff agreed that if the defendant would satisfy him the plaintiff, that he the defendant did not originate such reports, he would give up the note to the defendant.

THIS was an action of *assumpsit* on a promissory note. On trial upon the general issue, the defendant offered evidence to prove the following facts: That the note in question, was given in satisfaction of an injury done to the plaintiff, by the circulation of false reports, injurious to the character of the plaintiff's wife, & which the plaintiff alleged, were put in circulation by the defendant, and threatened to commence an action against the defendant to recover his damages.—That at the time the note was given, the plaintiff agreed that if the defendant would make it appear to his satisfaction that he the defendant did not originate the said reports, he the plaintiff would give up said note to the defendant. And that the plaintiff had acknowledged himself satisfied, by proof furnished by the defendant, that he the defendant did not originate said reports. *Franklin*, July, 1821.

The plaintiff objected to the admission of the evidence offered. The Judge overruled the objection, and the Jury returned a verdict for the defendant. The plaintiff filed exceptions to the opinion of the Judge. The cause upon the exceptions came on to be heard the present term.

Wetmore, for the plaintiff. If a note be delivered by the maker to the payee himself, the maker cannot be permitted to prove by parol, that the delivery was not absolute, but conditional. Esp. N. p. 221. Otherwise if it be delivered to a third person, and

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not to the payee himself, in such case the maker of the note may plead any parol matter, as that it was delivered conditionally or as an escrow.—Esp. N. p. 222. But if a note be delivered to the payee, or the party who is to derive benefit under it, it is not an escrow.—Shep. 55, 56, 57. 3 Bac. Ab. 320, 694—5. Cranch, Moss *vs.* Biddell. After a legal delivery of the note by the defendant, a right to the note became vested in the plaintiff, and nothing can be shewn by parol evidence to defeat that right.—Phil. Ev. 439.

Swift, for the defendant. An agreement made at the time of executing a note, or other written simple contract, that the payee shall give up the note or other writing, upon the performance of some act by the payor, is valid and founded on a valuable consideration: and the payor may give such contract and the performance of such contract in evidence under the general issue.—9 John. Rep. 232. 1 Sel. N. p. 40. 1 Chit. pl. 472. 7 John. Rep. 26, 383. Parol evidence is admissible to prove such contract, as it does not in any manner impeach or contradict the note.—10 John. Rep. 224. 11 John. Rep. 50.

The present case bears no analogy to a conditional delivery, but is strictly and legally a case of accord and satisfaction.—4 Esp. Rep. 255.

But the note in this case is void for want of a consideration.—10 John. Rep. 224. 11 John Rep. 50. 1 Camp. 40.

If, however, we are incorrect as to the principles of law, the Court will not grant a new trial, as it is apparent that justice has been done in the case.—2 Sal. 644. 2 Wil. 306.

The bill of exceptions in this case, contained another point which arose from the decision of the Judge in excluding a deposition, for a defect in the caption. The Court before which the deposition was to be used, was in the caption described as follows—"to be used in a cause to be heard and tried before the honorable County next to be holden at."

By the Court. The evidence admitted by the Judge, to prove the contract made at the time the note was executed, that in case the defendant would make it appear to the satisfaction of the plaintiff, that he the defendant did not originate, as was alleged, reports injurious to the character of the plaintiff's wife, he the plaintiff would give up said note to the defendant, was legally and properly admit-

ted. And, as it was proved to the Jury that the plaintiff was satisfied that the defendant did not originate such reports, the defendant was clearly entitled to a verdict, which ought not to be disturbed.

The evidence did not at all contradict the note, but proved that the parties had agreed on a mode by which the defendant might satisfy the note by the performance of a future act; and when that act was performed by the defendant, the note was as clearly paid and satisfied as though the defendant had paid the amount in money.

The evidence did, indeed, prove a want of consideration for the note, as there was no other consideration, but a discharge of the defendant from the plaintiff for damages, for the supposed injury which the defendant had done him by slandering the character of the plaintiff's wife, and as it afterwards appeared that the defendant had not done the injury, there was no consideration for the note; and yet, in point of law, the evidence could not be admitted for the purpose of proving a want of consideration. When one man alleges that another has done him an injury by the commission of a trespass upon his person or property, or by slandering his character, and the parties meet—make an amicable settlement—agree on the sum to be paid as a satisfaction for the supposed injury, and a note be given to secure the payment of that sum, in a suit upon such note, the defendant could not be permitted to defend, on the ground that he did not commit the injury for the satisfaction of which he had executed the note: it could not be permitted in a suit on a promissory note to try an action of trespass or slander as the case might be. The law will not permit such amicable settlements to be disturbed. And so it seems the parties understood the law in this case. They did not suppose that the defendant could avoid the note by proving that he did not commit the injury for a satisfaction of which the note was given, nor were they so unwise as to agree that the defendant might do so. But they did agree that if the defendant would procure evidence which should satisfy the plaintiff that he the defendant did not commit the injury complained of, that he would give up the note, or in other words that he would accept this in satisfaction of the note. This the defendant did, which in law and reason was a satisfaction of the note.

How the case would have been considered, without proof of the acknowledgement of the plaintiff that he was satisfied of the inno-

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cence of the defendant, but with proof sufficient to satisfy any reasonable man of his innocence, it is unnecessary here to decide.

In relation to the deposition rejected by the Judge, the Court are clear that his decision was correct. It is by force of the statute only that depositions are admitted as evidence, and the provisions of the statute must be substantially complied with. The Court cannot supply any material defect. In this case the defect in the caption is material; it does not appear in what Court the deposition was to be used. Let judgment be entered on the verdict.

TUTTLE *vs.* CATLIN.

If A. promise B. to pay him $150 for L. C. when he shall come of age, L. C. can neither maintain an action on such contract, nor discharge it.

Chittenden, July, 1821.

THIS was an action of *assumpsit*, on a receipt or contract in writing, in the following words:—

Received of Thaddeus Tuttle one hundred and fifty dollars, to be paid in obligations against some good man or men, to be on interest, for Levi Coit when he comes of age, on account of said Tuttle.

(Signed) MOSES CATLIN.

On trial upon the general issue, the defendant offered in evidence a discharge of the contract, executed by Levi Coit after he came of age, which was rejected by the Judge, and the Jury returned a verdict for the plaintiff. Exceptions were taken to the opinion of the Judge and allowed by him; and at the present term the cause came on to be heard upon the exceptions.

Van Ness, for the defendant. It is apparent that the promise on which this action is founded was made for the sole benefit of Levi Coit; and the person for whose benefit a contract is made may maintain an action on the contract; he must therefore be competent to discharge the cause of action.—1 Com. on Con. 564. 1 Com. Digest, 206.

Adams, for the plaintiff. It seems not to be questioned in this case, that the parties made a good and valid contract, and that

the plaintiff is entitled to recover, unless Coit had such a vested right in the contract, that he was competent to discharge it.

Coit was no party to the contract, nor did any part of the consideration pass from him, and no contract on the part of Catlin to pay to him. It would seem from an examination of the papers that the parties had in view the future interest of Coit: but whether he should receive any benefit from the contract, depended on the will of Tuttle. If there was any contract between Tuttle and Coit, and Tuttle was under obligation to pay him any thing, that contract may be enforced. If Tuttle was not under any obligation to Coit, but at the time intended this $150 as a gratuity, it ought to remain at his control. He did not then absolutely give it to him, and the circumstances of the parties may now render the execution of that intention improper. The situation of the parties may be such, as, either from the misconduct of Coit he ought not to receive it, or that superior obligation on the part of Tuttle to his own family may have rendered it improper that he should give it; of this he must be the judge, and the law will not deprive him of this right.

Coit could not maintain an action upon this contract; and, if he had no rights which he could enforce, he had none which he could discharge. To maintain a suit upon a contract, it must appear that the plaintiff was a party to the contract, or that the consideration for the promise moved from him. In this case, the consideration passed wholly from Tuttle. It does not appear that Coit had any interest in the $150, or any claim to it, except from the liberal intention of Tuttle. If a bond be executed to A. conditioned to pay a sum for the benefit of a third person, no action can be maintained in the name of such third person for the sum, and can be maintained in the name of A. only; nor can such third person discharge the bond.—2 Day, 550.

It has been said, that a consignee of goods may maintain an action against a carrier for not delivering them; but in such case the carrier has made an express contract to deliver the goods to the consignee. In this case Catlin entered into no contract to pay Coit, but to pay Tuttle.—Beside, the case of the carrier is governed by the law merchant, not by the common law.

By the Court. The words of the written contract on which this action is founded are, "Received of Thaddeus Tuttle $150 to be

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paid in obligations against some good man or men, to be on interest, for Levi Coit, when he comes of age, on account of Thaddeus Tuttle." Tuttle and Catlin were the only parties to this contract: it does not appear that Coit had any knowledge of it. The sum of $150 which Catlin received of Tuttle must be taken to have been Tuttle's money, in consideration of which Catlin promised to pay the amount in obligations to Tuttle—not to Coit. In every contract a promise to pay or deliver property without naming the person to whom the payment is to be made, is a promise to pay to the person with whom the contract is made—his name is understood & supplied in construing the contract. Catlin was by the terms of the contract holden to pay to Tuttle within a reasonable time: he had not the whole time until Coit should come of age, within which to make the payment. The obligations were to be on interest, evidently with a view that the sum might accumulate in Tuttle's hands until Coit should come of age, for whose benefit Tuttle then intended it.

It is admitted that this contract has not been fulfilled by Catlin, that he has not paid or delivered the obligations to Tuttle, but the defendant relies on a discharge of the contract from Coit. To decide that this discharge cannot avail him, it is unnecessary to go into a critical examination of the law, relative to the maintenance of an action by a third person for whose benefit a promise is made. For even in the case of a contract made for the benefit of a third person, a relation, such third person cannot maintain an action on such contract, unless it appear that the person making the contract intended that he should receive and have the absolute control of the property when paid; and this cannot appear unless the promise be to pay to such third person. And certainly it does not appear in this case that Tuttle ever intended that Coit should have the possession or control of this property when he should come of age, although he might have intended that he should have the benefit of it.

The discharge cannot be admitted in evidence.

Verdict for the plaintiff.

BUSH *vs.* WHITNEY.

Franklin,
December,
1821

If the plaintiff and defendant in an action of Ejectment both claim the same Lot under the same division, they are both estopped from denying the legality of such division.

The Selectmen of the several towns in this State, in which there is a Glebe Right, are empowered by statute to lease the lands belonging to such Right, reserving an annual rent; but have no authority to make any other conveyance of such lands. If, therefore, the Selectmen of a town make a conveyance of such Glebe land in fee, such conveyance is void—neither conveying any title to the grantee, nor affecting the rights of the town.

THIS was an action of Ejectment for Lot No. 123 in the town of St. Albans. On trial upon the general issue, the plaintiff exhibited evidence of a title in himself to several proprietors' rights in the town of St. Albans, but produced no evidence of a proprietary division of said town, nor did he attempt to prove that the Lot in question had been in any manner set to either of his rights, but relied on his right, as a tenant in common, to recover against the defendant, he being a stranger to the proprietorship.

On the part of the defendant, it appeared in evidence, that in the year 1789, Levi Allen surveyed the Lot in question, with a number of other Lots in the town of St. Albans.—That in September, 1790, the Lot in question was designated by pitch as a Glebe Lot. —That in 1800, the Selectmen of the town of St. Albans gave a lease of the same Lot, as laid to the Glebe Right, to one Bebee, who went into possession under his lease from the town, and continued in possession until the year 1806, when he sold his possession to the defendant, who also took a lease of the Lot from the town, and has ever since continued in possession.

The plaintiff then offered evidence to prove that in the year 1811, the Selectmen of the town of St. Albans conveyed the Lot in question to the plaintiff in fee, and took another Lot in exchange as and for a Glebe Lot,

To which evidence the defendant objected.

By the Court. The plaintiff admits that the defendant had been in possession of the Lot more than fifteen years before the commencement of the present action, but insists that the defendant is estopped from setting up his possession as adverse to the plaintiff,

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the grantee of the town, the defendant having possessed the Lot under the town.—And that the plaintiff, being a tenant in common in the town, is entitled to recover against the defendant, who appears to be a stranger to the title, unless he be permitted to set up his possession as adverse to the plaintiff. There can be no foundation for this claim of the plaintiff.

It appears that the town of St. Albans was many years since divided into severalty, or at least a part of the township—the Lot in question being laid to the Glebe Right. This the defendant has admitted, by accepting a lease of the Lot from the town, as a Lot laid to the Glebe Right. The plaintiff has also admitted the division by accepting from the town a deed of the same Lot. Now if the plaintiff and defendant both claim the same Lot under the same division, they are both estopped from denying the legality of the division, as they are estopped from contesting the title which they both derive from the same common source of title. But in the present case the plaintiff and defendant do both derive their title from the same common source, the town of St. Albans; the defendant by his lease, and the plaintiff by his deed; and it appears that the defendant has the elder and better title. And if it be admitted in such case that either party may set up an elder and better title than that which is derived from the common source, how does the plaintiff attempt it in this case?—Simply by denying the legality of the division, in order to let in his title as a tenant in common. But we have already seen that he is estopped from denying the legality of the division. Beside, if this were a Glebe Lot, the Selectmen of St. Albans had no authority to convey it in fee. The Selectmen of the several towns in which there are Glebe lands are empowered by statute to lease them, reserving an annual rent; this is the extent of their authority, and if they exceed this authority, by attempting to convey them in any other manner, their conveyance is utterly void—neither conveying any title to their grantee, nor affecting the rights of the town. If this were not a Glebe Lot, it does not appear that the town of St. Albans had any title or claim to it whatever: and it is clear that the defendant cannot be disturbed in the enjoyment of the Lot, either by the town, or by their subsequent grantee. The evidence offered must therefore be rejected.

The plaintiff moved for liberty to enter a nonssuit which was granted.

J. & J. Proctor *vs.* Christopher Webber.

An action of *assumpsit* will lie against corporation on a promissory note or other simple contract, made by their agent, duly authorised to make such contract.

THIS was an action of *assumpsit* on the following promissory note:—

"I Christopher Webber, as Agent of the Green-Mountain Turnpike Corporation promise to pay J. & J. Proctor the sum of——— dollars.

(Signed) CHRISTOPHER WEBBER,
Agent of the Green-Mountain Turnpike Corporation."

On trial of this case upon the general issue, the counsel for the defendant objected to the giving of the note in evidence to the Jury, for a variance between the note declared on and the note offered in evidence, which objection was overruled by the Judge.

The counsel for the defendant then produced evidence to prove that the note in question was given in satisfaction of a demand in favour of the plaintiffs against the Green-Mountain Turnpike Corporation; and that Webber was the agent of said Corporation, authorised and empowered to settle the aforesaid demand of the plaintiffs, and other demands against said Corporation, and requested the Judge to charge the Jury that said Corporation were liable to pay said note, and that the defendant was not liable in law to pay it. The Judge refused so to charge the Jury, but charged them, that an action of *assumpsit* cannot be maintained against a Corporation, and they found a verdict for the plaintiffs.

The counsel for the defendant, filed a motion for a new trial, upon which the cause came on to be heard the present term.

Hutchinson for the defendant. This is an action on a note charging the defendant in his individual capacity. The defence set up is, that the defendant gave the note, as agent of the Green-Mountain Turnpike Corporation—that he gave it for their debt, and declared his agency on the face of the note.

The defence arose in two ways—first, on objection to the reading of the note as evidence to the Jury, and we contended that it

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ought to have been excluded, on either of two grounds—first. it is described as the note of the defendant, and it appears on the face of it to be the note of the Corporation. If the plaintiffs would contend, that the defendant is holden, by reason of his attempting to bind the Corporation when he had no power to do it, they should have framed a declaration according to the fact, and given notice to the defendant, and taken upon themselves the burthen of proving that the defendant defrauded the plaintiffs, by palming upon them the note of the Corporation wrongfully. Secondly—if this mode of declaring on the note can be supported, still, as the note, when produced, *prima facie* is not the note of the defendant, but of the Corporation, that *prima facie* appearance should have been done away by proof on the part of the plaintiffs, before the reading of the note.

The second shape in which the defence was presented, and to which the defendant was driven by a failure on the first ground, was, by adducing proof that the defendant was the agent of the Corporation—that the plaintiffs knew it.—That the plaintiffs had sustained damage by the fall of a bridge which the Turnpike Corporation were bound to repair; that the defendant settled these damages by giving the note in question.—That all such prudential concerns of the Corporation were usually attended to by their agents.—That the directors intrusted this particular business with the defendant Webber, as agent of the Corporation.—That the by-laws of the Corporation confer very unlimited powers upon their agents.—That this was all a fair transaction, understood alike by all parties.—And there was no pretence that the Turnpike Corporation ever objected to their liability to pay this note. The decision of the Judge, that on this evidence, the plaintiffs were entitled to recover, cannot be supported by law, and if not by law, surely in no way; for this is clearly an attempt by the plaintiffs to charge the defendant in a way that neither he nor the plaintiffs thought o when the note was given. As the plaintiffs, therefore, are seeking strict law, we will produce authorities to shew that they are not by law entitled to recover.

The case Mann *v.* Chandler, 9 Mass. Rep. 335 was an action on note given by the defendant, as Treasurer of the Dorchester Turnpike Company—his capacity being, as in the present case, stated at the beginning and end of the note. But in that case the

note was so described in the declaration. In that case, as in the present, it was contended that the defendant was not legally authorised to bind the Corporation, but the Court decided otherwise, not because the charter or by-laws of said Company expressly conferred any such powers, but the Court said "it cannot be doubted that the Corporation is itself liable—the consideration moved wholly from them. It is very apparent that the plaintiff did not, at the time of receiving the notes, look to the defendant's personal security. The whole transaction was on behalf of the Corporation. Their property is liable, and the defendant's is not." The same reasoning applies throughout to the present case. We also cite Hodgson *v.* Dexter, 1 Cranch 345.—Dexter had given the bond under his private seal, but had described himself as secretary at war, and gave the bond for the rent of buildings for the use of government; and, as it was wholly a government concern, the signature and private seal of Dexter were adjudged not to bind him personally. We cite also the case Mackbeath *v.* Haldimand, 1 T. Rep. 172.—The reasoning of the Court and their decision in this case shew that the plaintiffs cannot maintain the present action against Webber on this note.

Marsh for the plaintiffs. The defendant by the terms of the note in question, promised as agent, and signed the note as agent of the Green-Mountain Turnpike Corporation, and the question is, whether by this note he bound the Corporation, or himself in his private capacity; if the former, the action is misconceived, and the defendent is entitled to judgment; if the latter, judgment must be entered on the verdict.

It would seem that the defendant, by the very terms of the contract, meant to bind, and did bind himself in his individual capacity. The expression is, "I, as agent of the Green-Mountain Turnpike Corporation, promise &c." The promise is made by the party signing the note, and does not purport to bind any one else. The object in using this mode of expression was to make it appear that it was a contract concerning the affairs of the Turnpike Corporation, and against which the Corporation were bound to indemnify the defendant, but still he contracted for and bound himself.

An attorney or agent contracting for his principal, must contract in the principal's name, and must place the principal's name to the

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contract, and his seal, if a seal be required; he cannot otherwise bind the principal. Strange, 705.

If it appear from the terms of the contract to have been the intention of the defendant to bind himself, or if from a proper construction of the terms of the note it is his contract, and binds no one else, he is liable on the contract in his individual capacity.

It is clear that a person may contract for another—that is, bind himself that another shall perform a certain act, as well by simple contract as by specialty. A. may agree that if B. will credit C. he (A.) will be accountable that C. shall pay. Here the trusting of C. is a good consideration, and where the statute of frauds is not in force, the contract would be binding, though made by parol, and if in writing, would be valid notwithstanding the statute. So here, the acknowledgement of value received, and especially the discharge executed by the plaintiffs to the Corporation is a sufficient consideration for a promise by a third person.

In this case, however, the defendant did not contract that a third person should pay, but that he, as agent, would pay: let him pay as agent, and the plaintiffs will be satisfied.

It cannot be seriously contended that this note as such binds the Corporation; it does not purport to be a contract by them, but another promises for them, or, which is the same thing, as their agent—not that the Corporation shall pay, but that he will pay.

It may be doubted whether a Corporation of this kind, as it can act only by its seal, can make a promissory note by which it would be bound as such, notwithstanding the case, Mann *v.* Chandler, 9 Mass. Rep. 335, which will be more particularly noticed hereafter.

The agents of a Corporation, can bind them for work and labor, at least on a *quantum meruit*, and for materials found on a *quantum valebant*, and, perhaps, an agreement for a particular price by the agent may be evidence that such price is reasonable. But no case is found, except the case above alluded to, where it is held that a Corporation of this kind is bound by a promissory note or other written contract made by its agents, and not under the seal of the Corporation.

Where the seal of the Corporation is affixed by one having a right to affix it, it becomes the deed of the Corporation, and covenant will lie against the Corporation for a breach. So, perhaps a Corporation may be bound by a vote entered of record.

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It is not easy to perceive why the agents of such Corporation should have power to bind their principal by a promissory note—power to bind them for such things as are necessary, and to the amount of what such necessaries are worth, is all that is needful or safe in the hands of such agents. They certainly cannot issue notes on any and every speculating project, which would bind the Corporation. If they can issue notes, why not ever so many, and become at once a banking institution?

To these remarks banking Corporations are an exception, because they are incorporated for the express purpose of issuing notes, and are expressly empowered to issue them.

The authorities all shew that in case of instruments under seal, the agent or attorney must act in the name of his principal, and affix the seal of his principal, and if he otherwise execute a sealed instrument, he binds himself, not his principal. To this effect is the case of Wilks and another *v.* Back, 2 East, 142. Wilks, by virtue of a power of attorney from his former partner, James Brown, executed a bond of submission of a matter of controversy with Back, and signed the bond in the following manner:

"MATTHIAS WILKS, (L. S.)
for JAMES BROWN.
MATTHIAS WILKS. (L. S.)"

And the bond was sealed and delivered by Wilks for himself and his late partner, Brown, but Brown was not present. This was adjudged to be the same thing as if he had said 'James Brown, by M. Wilks;' but it was agreed by all that the attorney must act in the name of the principal. And, no doubt the tenor of the bond was, 'We, M. Wilks and James Brown, acknowledge ourselves bound, &c.' and in this case many older cases are cited to the same effect, from Ld. Ray, Strange, &c.—So is the case of Appleton *v.* Binks, 5 East 148, where one acting for another, and using his own name and seal, was judged to have rendered himself liable.—So in the case Tippits *v.* Wather et al. 4 Mass. Rep. 595.—The defendants were a committee of the Directors of the Middlesex Turnpike Corporation, and as such entered into a contract with the plaintiff, but they used their own names and seals, and were adjudged personally liable.

So is the law also in the case of executors and administrators. Where an executor conveys real estate of the testator, and cove-

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nants in his capacity of executor, and signs as executor, using the expression, 'witness my hand and seal,' he is holden in his private capacity—Barry *v.* Rush, 1 D. & E. 691. where an administrator had submitted a matter of controversy to arbitration, and covenanted to abide the award, he was held liable in his individual capacity, and could not plead *plene administravit*. So the case Sumner administrator *v.* Williams, 8 Mass. Rep. 196, 207. where the defendants were administrators of Dudley, and had conveyed lands belonging to the estate of the intestate, and covenanted in their capacity of administrators, were held liable in their private capacity by Sewal, J., and Parker, J.—Sedgwick, Justice, contra.

There is another class of cases, where agents acting for the government are not held liable, whether they bind their principal or not; but in all these cases, such agents are excused on the ground of publick policy. In the case of Tippits *v.* Walker and others Parsons, Justice makes the same remark. Mackbeath *v.* Haldimand, 1 D. & E. 172. Hodgdon *v.* Dexter, 1 Cranch 345, 362.

It is difficult to conceive what can distinguish a simple contract, such as a promissory note, *in this respect*, from a sealed instrument. It is certainly no more binding on the Corporation or principal when the agent acts without authority; and if not binding on the principal, and a valuable consideration has passed, no matter from whom or to whom, the agent, if he do not bind the principal, binds himself. And it is not found that any such distinction has been taken except in the case referred to of Mann *v.* Walker, where the defendant gave a note as treasurer of the Dorchester Turnpike Corporation, at the request of the directors of said Corporation, who had directed him to settle by note or otherwise with all persons, to whom the president might give an order for the amount due them. The Court decided that the defendant was not liable, but that the note was good against the Corporation.

It will be noticed that no authority was cited in support of this decision; nor does it appear that the case gained the particular attention either of the counsel or the Court. It is therefore believed that this decision is not much to be relied on as an authority, especially as it is not known to be supported by any prior or subsequent case.—Judge Parsons was not then a member of the Court.

But it is insisted by the defendant's counsel, that the Corporation

had conferred power on the agent to execute the note in the present case, and to render it binding on the Corporation, and relies on the 5th section of the act of incorporation.

This section merely authorises the Corporation to appoint such number of directors or agents to manage the affairs of said Corporation as they may judge proper. But the act no where authorizes the Company to empower their directors or agents to execute promissory notes which shall be binding on the Corporation. The Corporation then could not have conferred any such power on the directors or agents. The terms directors and agents seem to be used in the act as synonymous; but in this case the Corporation appointed directors, and an agent also. If I am correct in the construction given to this section of the act, the Corporation could not appoint both directors and agent; and if they appointed several directors, a majority of them only could act. Had they appointed only one, he might have done the whole business; but having appointed several, one could not act alone.

But it is said that the directors requested the defendant, as the agent of the Corporation, to settle the demand of the plaintiffs against the Corporation; but the directors had no authority to delegate their power to any other person or persons; but in doing this business it would seem that the defendant was the agent of the directors and not of the Corporation.

In the case Tippits *v.* Walker and others, before cited, the defendants were a committee of the directors, and it was decided by the Court that the directors could not delegate any authority to a committee, and, therefore, the committee bound themselves in their private capacity.

As the Corporation had in this case both directors and an agent, it may be asked in which was the power of managing the affairs of the Corporation lodged?—Was it in the directors or agent? or had each paramount authority? Was the consent of the directors necessary to the validity of the acts of the agent? or could he act without or against their directions? On the whole, in any view which can be taken of this case, the Corporation cannot be liable to pay the note in question, and therefore the defendant is liable to pay it.

By the Court. This case comes before the Court on a motion for a new trial, made by the defendant, on two grounds:

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1st. That on the trial the Judge admitted the note on which the plaintiffs had declared, to be given in evidence to the Jury, to which the defendant had objected, on account of a variance between the note described in the declaration, and the note produced on trial.

2dly. On an exception to the charge of the Judge, who charged the Jury, that in point of law the Corporation were not made liable by the execution of the note, as it was not under their seal. That a Corporation can be bound only by their seal, or by a vote duly recorded; and, of course, cannot be liable in an action of *assumpsit* on a special contract. And that whenever a person undertakes to bind a Corporation as their agent, either by specialty or simple contract, and fails of rendering the Corporation liable, for want of authority in himself, as their agent, he renders himself liable in his private capacity.

The question arising from the exception to the evidence, the reading of the note to the Jury, is involved in the question arising under the exception to the charge of the Judge. For if the defendant did not, as agent of the Corporation, render them liable to pay the note, he rendered himself liable, and the plaintiffs properly declared on the note according to its legal effect. If by the execution of the note the defendant did render the Corporation liable to pay it, he is not himself personally liable, and the plaintiffs are not entitled to recover. For, as remarked by the plaintiffs' counsel, no distinction can be taken in this respect, between the execution of a specialty and a simple contract. In both cases alike, if the person executing the instrument, as agent, do not bind his principal, he binds himself personally; and the statement in the contract that he is agent, shall be taken as *descriptio personae*, or as surplusage. And as the evidence given to the Jury on the part of the defendant, to prove his agency and authority to bind the Corporation, was by the charge of the Judge withdrawn from the consideration of the Jury, and rendered of no importance in making up their verdict, it is unnecessary to inquire into the sufficiency of that evidence; and the only question presented for the consideration of the Court under the motion for a new trial is, can a Corporation by their authorized agent, make a promissory note or other contract, not under their seal, on which a special action of *assumpsit* will lie against such Corporation?

Windsor, August, 1822.

Proctor, *vs* Webber.

The Court are unanimously of the opinion, that if the defendant was, in point of fact, directed by the Corporation, as their agent, and in their behalf, to make and execute promissory notes, for the payment of demands against the Corporation, he was duly authorised, in point of law, to do so; and the Corporation are liable to pay the note in question. Consequently, this action cannot be maintained against the defendant.

New trial granted.

Note.—This case having been decided before provision was made for the reporting of the decisions of the Supreme Court, the opinion of the Court *at length* could not be obtained. This is a subject of regret, as the question involved in the case is of great importance. It is one of those cases involving the question, shall the English common law prevail, or the American law? and what is the American law as applicable to the case? I have therefore thought that it would not be wholly useless or unacceptable to the profession, to subjoin a note, setting forth the rule of the ancient common law as applicable to this case, and containing a number of modern cases decided in the Courts of Great Britain, shewing a progressive alteration of the rule, together with a collection of American cases, shewing that the ancient rule of the common law has been wholly set aside, and a new rule settled, better adapted to the present state and condition of our country. Agreeably to this rule the above case was decided by the Court. See the note at the end of the reports in this volume.

S. W. & S. S. Keyes *vs.* Lyman Weed.

The statute of 1801 takes from the jurisdiction of the County Court every action or suit made cognizable before a Justice of the Peace. Held, that if an action be brought before the County Court on several notes, each of which notes separately, is within the jurisdiction of a Justice of the Peace, yet if the aggregate amount of all the notes exceed his jurisdiction, such *action* is not made cognizable before a Justice of the Peace, and therefore the County Court have jurisdiction of it.

Franklin, December, 1823.

THIS was an action of *assumpsit*, brought originally before the County Court, on three several notes of hand—one for $249, one for $175, and one for $30. After a general verdict for the plaintiff, in this Court, upon the issue of *non assumpsit*, the defendant moved in arrest of judgment, on the ground that the Court has no jurisdiction of the subject matter of the third count of the declara-

Franklin. December, 182.

Keyes *vs.* Weed.

tion which is upon the note for thirty dollars—the same being with in the jurisdiction of a Justice of the Peace.

Fisk for the plaintiffs.

Brayton for the defendant.

The opinion of the Court was delivered by

SKINNER, Ch. J. There is no pretence that the defendant is prejudiced by permitting the plaintiffs to include in the action the small note declared upon in the third count; and it cannot be questioned that such proceeding is laudable, and ought to be sanctioned by the Court, unless clearly forbid by the statute. The Legislature, by repeated acts, have attempted to prevent a multiplicity of suits, where a single action would avail the party; and the practice of the English Courts is to consolidate, and compel the plaintiff to pay costs.

It is insisted, that as a Justice of the Peace has jurisdiction over the subject matter of the third count, the County Court has not; for by the statute of 1801, concurrent jurisdiction is taken away. Before this statute was passed, it had been decided by the Supreme Court, that the County Court and Justices of the Peace had concurrent jurisdiction in *civil actions*, Young *v.* Saunders, 1 Tyler 8, and the statute forbids the County Court taking cognizance of any *action* or *suit* made cognizable before a Justice of the Peace. This statute says nothing about the *matter in demand* or *cause of action*. The statute of 1821 authorises a Justice of the Peace to hear, try, and determine all actions of a civil nature, where the matter in demand does not exceed 100 dollars. It is clear then under this statute, that a Justice has not jurisdiction of this action; the matter in demand in the action far exceeds 100 dollars.

The plaintiff is at liberty to join distinct *causes* of action in the same *suit* or *action*, or to bring separate actions upon each cause. It does not follow, that, because several actions may be sustained, and jurisdiction thereby given to a Justice of the Peace, where a joinder would be proper at common law, several actions must be brought, and the jurisdiction of the County Court ousted; nor did the Legislature so intend. In a variety of cases the plaintiff may elect to bring several actions, or but one; and so has ever been the course of proceeding. If several chattels are *trovered*, amounting in value, not separately, but in the whole, to more than 100 dol-

jars; if 200 dollars annual rent is reserved, payable quarter yearly; if a note of 150 dollars is made payable in several instalments, it is every day's practice in these cases for the plaintiff to elect his tribunal. As then there is no statute prohibiting the joinder of several *causes* of action in the same *suit* or *action*, and the joinder in this action is consonant to the common law, and the demand therein exceeds the jurisdiction of a Justice of the Peace, it results necessarily, that the County Court had original jurisdiction. This principle is supported by the case of Cook *v.* Porter, 1 Tyler, 450.

Franklin, December, 1823.

Keyes *vs.* Weed.

Judgment must therefore be rendered on the verdict.

Mower *vs.* Allen and Bateman.

In Error.

The statute requiring Muster Rolls of Militia Companies to be made, is merely directory to Officers; and if in any case it be omitted, this neglect of the Officer will not excuse any one from the performance of military duty.

If an order to warn a Company to do military duty be made by the Commanding Officer, to A. B. Sergeant, his warning is valid although he be but a private in the Company.

The law does not require a return to be made on such order.

Militia Officers are by the statute constituted Courts of competent jurisdiction, and, in imposing fines, act judicially—not ministerially. The party aggrieved by the decision of the Commanding Officer of a Company, may appeal to the Regimental Field Officers, whose decision is conclusive, and can no more be called in question collaterally, than the decision of any Court of law of a limited jurisdiction. The decisions of both are conclusive, while acting within the limits of their jurisdiction.

The law which requires a warrant to an Orderly Sergeant to be recorded by the Adjutant, is merely directory; and if the record of the warrant be omitted, the authority of the Orderly Sergeant is not thereby affected.

THIS was a writ of Error, brought to reverse a judgment rendered by the County Court for the County of Chittenden, in favour of the defendants, in an action of trespass, in favour of the plaintiff against the defendants, originally commenced before a Justice of the Peace, and brought to said County Court by appeal. On trial of the action in the County Court, the plaintiff filed a bill of exceptions, on which he brought this writ of Error.

Chittenden, January, 1824.

Chittenden, January, 1821.

Mower vs. Allen and Bateman.

Adams and *French* for the plaintiff.—They cited Chit. 183. 1 Esp. & Peak, 203—300. Willes, 200—416. 1 East Rep. 216.

Thompson and *Richardson* for the defendants.—They cited 1 Esp. Digest. 274—275. 2 Willson, 384. 3 John. Rep. 431. 7 John. 549.

The case is fully and clearly stated in the opinion of the Court, delivered by

SKINNER, Ch. J. This cause is brought before the Court by writ of Error upon the judgment of the County Court of this County. From the record, it appears that the action is trespass, for taking an ox, valued at 50 dollars. One of the defendants, Bateman, justifies the taking, &c. as orderly sergeant of a militia company, under a writ of execution, to him directed and issued, on the 3d of October, 1820, by Marcus Allen, Captain and commanding officer of the said company, upon an amercement imposed by said commanding officer upon Mower, the plaintiff, for delinquency of military duty. Replication, *de injuria*. Allen, the other defendant, under the general issue and notice, justifies on the ground that the plaintiff being subject to military duty, the defendant as Captain and commanding officer of the company, amerced him for neglect of duty, and, as such commanding officer, issued the execution therefor. The first cause assigned for error is the admission in evidence of an irregular muster-roll. From the record it appears, that the defendants having on the trial shown in evidence, that the office of Captain in the company was vacant, and that Allen was Lieutenant, to show, that the plaintiff was a private, subject to do military duty in the company, and had been duly enrolled therein, offered a paper purporting to be a muster-roll, said to be irregular. The objection to its admission was overruled. The principle on which we rest the decision in this case, renders it unnecessary to notice the irregularity complained of.

The statute requiring the making of a muster-roll is directory to the officer; and the neglect cannot be taken advantage of in this way; nor will it excuse any member of the company from the performance of military duty. This statute has provided, that a *warning* for a company training shall be *notice* of the enrollment; and without such warning no fine can be imposed. The muster-

roll, therefore, was immaterial on the trial, as was the fact of enrollment. Showing the enrollment, however regular, would have no tendency, it is true, to establish the fact of Mower's being subject to military duty in the company, but this was not the objection. If the fact of his being subject to military duty was material on the trial, and the record did not show that evidence was given of all that is required of the defendants in relation thereto, the question would merit a different consideration. It does not appear that Mower claimed to be exempt from military duty; and if he did, the *onus probandi* would fall on him.

The second error assigned is the admission of the order for warning, and the return thereon. The objections are, that it had not been shown that Bateman, to whom it was directed as *second sergeant*, was such officer, and that his *return* does not show the time or manner of service. The law authorises the commanding officer to issue his order for warning to one or more non-commissioned officers, or, for want thereof, to one or more privates; and it is immaterial, and cannot be questioned by the private warned, whether he, to whom the order is given *by name*, sustains the office mentioned in the order or not. The law requires no return to be made upon the order, by the person to whom it is directed, though the return in form in this case has been sanctioned by a long course of practice.

From these decisions, the Court are enabled to avoid a more careful consideration of the question as to the effect of the proceedings of a military tribunal in imposing fines. It may well be urged, that the Legislature has constituted militia officers Courts of competent jurisdiction to decide the question. An appeal lies, from the commanding officers of companies, to the regimental field officers, whose acts in the case are not ministerial, but judicial; and it would seem their decisions must be conclusive. It is fully established, that the judgment of a Court, having jurisdiction of the subject matter, cannot be collaterally impeached. If a person amerced in a fine is aggrieved, his proper remedy is by appeal. A different course would be dangerous indeed to the officers of the militia, and in the end subversive of all military authority. Cowp. 315. 3 T. R. 125. 2 Bos. & Pull. 391. 3 Maul & Sel. 411. 7 T. R. 633. 12 East. 75. 16 East. 21.

Chittenden, January, 1824.

Mower *vs.* Allen and Bateman.

The writ of execution is objected to on the ground that it does not appear that Allen was Captain; the same being signed by Marcus Allen, *commanding officer*. The defendants justify under him; and he is described in their pleadings, as Captain and commanding officer. The record shows that the office of Captain had been vacant; and the commission of Allen, as Lieutenant, also appears; therefore his authority to issue the execution is established, whatever may have been the defect in his commission as Captain.

It is also objected, that Bateman, to whom the execution is directed, as orderly sergeant, was not such officer on the 3d day of October, 1820, the time of issuing the execution. The warrant to Bateman is dated July 3d, 1820: the oath administered by Marcus Allen as Captain, August 28, 1820: and the record in the office of Adjutant bears date March 23d, 1821. If it was necessary to the validity of the acts of Bateman, as sergeant, that he should have been sworn, there can be no doubt of the authority of Allen, as Lieutenant and commanding officer of the company, to administer the oath, however he may have entitled himself in the certificate thereof. The record, required to be made, of the issuing of the warrant, is directory to the Adjutant, and not material to the authority of the officer. The charge of the Court therefore must be approved, and judgment affirmed.

CHITTENDEN *vs.* HURLBUT.

An action will be dismissed in any stage of it, if it be discovered that the Court have not jurisdiction of the subject matter of the action. But the Court will not, *on motion*, dismiss an action of Book Account, on the ground that a part of the articles charged on the plaintiff's book, are not proper articles of book charge, and which, being deducted from the plaintiff's account, will reduce the remainder within the jurisdiction of a Justice of the Peace.

Chittenden, January, 1824.

THIS was an action of Book Account, originally commenced before the County Court, and came to this Court by appeal.

At the last term of this Court the defendant filed a motion to dismiss the action, for want of jurisdiction, for that the action was originally cognizable before a Justice of the Peace, and not before the County Court.

The opinion of the Court was delivered at the present term by

SKINNER, Ch. J. This action was originally commenced before the County Court. After oyer of the plaintiff's book of $227 03, consisting of several articles, one of which is the payment of an order or draft of $200, the defendant pleaded that he had fully accounted for all the charges, &c. An issue is formed, and verdict thereon, that the defendant account, on which judgment is rendered; and an appeal is taken to this Court by the defendant. He now moves the Court to dismiss the action, for that 1st, it appears upon oyer of the plaintiff's account, that the same amounts only to $27 03 of such articles as are proper to be charged on book; 2dly, that the said draft of $200 contained in oyer is not a proper article of book charge; 3dly, that said draft is the same, and no other, that was furnished as a specification of the plaintiff's claim, in an action of *indebitatus assumpsit* in favour of the plaintiff against the defendant, now pending in this Court, and upon which claim judgment has passed, at the present term of this Court, against the defendant." It is unquestionably the duty of the Court, on discovering the subject matter of a suit to be without its jurisdiction, to dismiss it, whether moved by the party or not. In this case the counsel for the defendant contends, that one of the items of charge in the plaintiff's account cannot legally constitute a charge on book, and without this the charges amount to a sum cognizable before a Justice of the Peace; that the County Court and Justices of the Peace have not concurrent jurisdiction in any case; therefore the subject matter of this action is without the original jurisdiction of the County Court.

Whether the payment of the defendant's draft upon the plaintiff in favour of McGonzer constitutes a proper item of charge on book is questionable. No precise rule has been, or can be established as to what may be legally charged on book. Drafts to a small amount are every day drawn upon, and paid by the merchants through the State, and the same are charged on book. To what extent this practice has been, or ought to be, sanctioned by judicial decision, is not necessary now to inquire. If this cause is dismissed on motion, it must be for a defect of jurisdiction in the subject matter, apparent upon the record. No issue is, or can be formed or tried upon motion. The subject matter of this suit is clearly within the jurisdic-

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tion of the County Court. The amount claimed, as given on oyer, is $227 03. The principle will be clearly illustrated by supposing the action to have been *assumpsit*, and the same articles, under the rule for that purpose, given in the specification. No question could then arise as to jurisdiction. Again, suppose the only charge given on oyer in this case had been the draft of $200, charged on book. The remedy would not be by application to the Court to dismiss for want of jurisdiction of the subject matter. The objection would be rather to the *form* of action. Surely then, adding that which is admitted to be proper in the action cannot vary the case. No doubt, if issue in this case had been found for the defendant upon these pleadings, the judgment, unappealed from, would have been conclusive; it would never have been considered a proceeding *coram non judice*. So too if judgment had been rendered for the plaintiff for the full amount claimed, or any less sum. If it should appear, that this or any other article of charge had been rejected, as an illegal charge on book, the judgment might not constitute a bar to a recovery thereafter for the article rejected. To adopt a principle that would subject all concerned to the consequences of proceeding *coram non judice*, for a mistake as to matter, which may be offered in support of a particular *form* of action, would be dangerous indeed.

If in any case it is discovered, that there has been an improper attempt to give jurisdiction to the County Court, whether for the purpose of increasing costs, or with any other fraudulent intent, the Court will not only dismiss the suit, but will administer to the attorney that correction which the nature of the case may demand. Nothing improper or illegal is discoverable in the proceedings in case; therefore

The defendant takes nothing by his motion.

HURLBUT *vs.* MAYO.

M. caused an execution in his favour against H. to be levied on a certain tract of land, in part satisfaction of the execution; but the tract of land, described in the Sheriff's return on the execution, was not shewn to the appraisers, or appraised by them; but a different tract of land containing the same quantity of acres, but of less value than that which was described in the Sheriff's return.—Held that H. the debtor, was entitled to relief by *audita querela*, and the levy of the execution was set aside.

THIS was a writ of *Audita Querela*, containing the following complaint:—That the said Mayo by the consideration of the County Court holden at Burlington in and for the County of Chittenden, September term, 1820, recovered judgment against the said Hurlbut for the sum of $345 43 damages, and for the sum of $16 91 costs of suit; upon which judgment the said Mayo took out his execution dated 1st of December, 1820, and on the 27th day of the same December, extended the same on a certain tract of land situate in Essex in said County, in part satisfaction of the sums of money contained in said execution, and the costs and charges thereon arising, as the proper estate of the said Hurlbut, described as follows, to wit: Beginning at a stake in the north line of that part of Lot No. 112, which was heretofore conveyed by John Thompson to said Hurlbut the debtor, which said stake stands 8 chains and 50 links easterly from the south-easterly line of Lot No. 175; thence from said stake S. 27 deg. W. 25 chains 42 links to a stake; thence S. 63 deg. E. 12 chains 50 links to a stake; thence N. 27 deg. E. 25 chains 42 links to a stake; thence N. 63 deg. W. 12 chains 50 links to the place of beginning, containing thirty acres and a half exclusive of the road which passes through the same; being part of Lot No. 112. And the Sheriff who made the said levy, by his return made on said execution, under his official signature, hath represented and set forth, that he caused the before described lands to be appraised under oath, and according to law, by A. B. and C. appraisers chosen by the said Mayo and Hurlbut, at the sum of $274 78 as being the true and just value thereof in money. All which will appear by the record of said execution with the return thereon in said Court remaining. And now the said Daniel Hurlbut in fact saith that neither the said Sheriff, nor the said Mayo the creditor, did ever shew to the above named ap-

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praisers the aforesaid described land, nor did the said appraisers view or appraise the same as set forth in the said Sheriff's return; but on the contrary, the said appraisers did appraise a tract of land containing about thirty acres, being part of said Lot No. 112, which is situate and lies easterly of said tract described in said Sheriff's return, except about ten rods of land running lengthwise of, and on the easterly side of the first described tract. And the said Daniel Hurlbut further saith that the said first described tract, so set off by the said Sheriff's return in manner aforesaid, is of much greater value than the said tract which was shewn to said appraisers, and which said appraisers did actually appraise, in part satisfaction of said execution; and that the said Daniel's farm is greatly incumbered thereby and reduced in value. By all which the said Daniel is greatly injured and aggrieved, Whereupon he prays that the said levy of said execution, the appraisal of the lands thereon as aforesaid, and all the proceedings had thereon, may be set aside and held for nought, and that he may be restored to all that which he has lost, &c.

To this complaint there was a general demurrer and joinder.

Adams for the defendant. If the facts set forth in the complaint are true, and the plaintiff has sustained the injury complained of, an *audita querela* is not the proper remedy; it will not lie to set aside an execution, unless the judgment has been satisfied, or some fraud practised in obtaining it. In this complaint, no fraud or circumvention is alleged, and no payment or satisfaction is pretended. That an *audita querela* will lie in such case is contrary to the commonly received opinion and unsupported by precedent.

No action can be maintained for any thing alleged in the complaint. If, as the plaintiff alleges, the levy of the execution is irregular, the defendant has gained no title thereby; his entry upon the land would be a trespass, and the defendant might recover his damages.

The levy of the execution may operate as a satisfaction of the judgment, but of this Hurlbut has no right to complain; and if Mayo has gained nothing by the judgment, it would be vindictive to punish him for his errors and mistakes, by a judgment for damages and the costs of this suit.

The case may present some difficulties, but they are all on the

side of the defendant. Whether a Court of Equity would grant relief to the plaintiff, is a question which need not be agitated here; at all events this Court have no power to grant relief, in this action, if the mistake of which the plaintiff complains has occurred. The proper time to try the validity of this levy would seem to be, when Mayo shall attempt to get possession of the land upon which the levy was made. If Hurlbut has any object in trying the validity of the levy before an entry upon the land, let him bring his bill in Chancery; and, on his conveying to Mayo the land which he says was shewn to the appraisers, the Court might set the levy aside and thus do justice to both parties.

Griswold and *Thompson* for the plaintiff. The right of a creditor to extend an execution on the lands of his debtor, is given by statute: to acquire a title, therefore, by such levy, it is necessary that the steps pointed out by the statute should be strictly pursued. The statute, among other things, provides that the appraisers shall appraise such real estate as shall be shewn to them, and that the officer shall set out such estate, so by them appraised, by proper metes and bounds. The complaint in this case discloses the fact, and which is admitted by the demurrer, that the estate described in the officer's return, was never shewn to the appraisers appointed on said execution, and of course was never appraised by them; but that another, and different tract of land was shewn to, and appraised by them. Statute 323. Swift. Dig. 154—5.

From such manifest injustice, the party considers himself entitled to relief, and, in some form, the Court will be solicitous to extend it to him. But the question in this case is, can the plaintiff obtain relief by *audita querela*? This writ is emphatically a process in the nature of a Bill in Equity, and is sustained whenever legal process has been abused, and has been injuriously executed in a fraudulent and oppressive manner, and the party injured has had no opportunity to defend. In England, and in those States which have adopted the English practice, a remedy in such case is had by motion in the Court which rendered the judgment and granted the execution. Bac. 134—5—6—7.

As by the rules and practice of our Courts, relief cannot in such case be obtained by motion—the party is left to seek his remedy by *audita querela* alone. The law is well settled, that the plaintiff

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cannot in an action between him and the defendant, to try the title to the land in question, contest the validity of the judgment, execution or officer's return. All these, in point of form are good, and being matters of record, cannot be questioned until regularly set aside. 8 John. 281. 3 Caines, 267. 13 John. 97. 11 Mas. 165. 9 id. 96. Neither can this record be contested to the prejudice of any person claiming under the creditor. 11 Mas. 165.

This proceeding by *audita querela*, resembling as it does a Bill in Equity, is entitled to the favourable consideration of the Court. It cannot be denied that the complainant discloses strong grounds for relief. It is equally clear that the party is remediless, unless by this writ he can be restored to his rights. His remedy against the Sheriff, if indeed he has one, for a false or undue return, is not commensurate to the injury which he has sustained, and he ought not to be compelled to resort to this course, unless confined to it by some unyielding principles of law. The opinion of the Court was delivered by

WILLIAMS, J. The complaint sets forth, that in September, 1820, Mayo, the defendant, recovered judgment against Hurlbut, the complainant.—That an execution issued thereon, which was extended on certain lands described in the complaint, and the execution returned, as having been regularly levied on those lands in satisfaction of the judgment and execution.—That the land described in the Sheriff's return on said execution, was not shewn to the appraisers, or appraised by them; but that a different tract of land, containing the same number of acres, was shewn to and appraised by the appraisers, which is of far less value than the land described in the return: and the question is, whether on this complaint the plaintiff is entitled to relief.

On the part of the defendant it is urged, that if the levy is irregular, Mayo has acquired no title to the land thereby, and that his entry thereon would be a trespass. This position is certainly incorrect. The judgment and execution being regular, and the levy and return apparently so, they are conclusive, not only as to these parties, but as to all others, until set aside, and cannot be controverted, in any action of trespass or ejectment, where the title to the land comes in question.

It has also been said that the plaintiff must resort to a Court of

Chancery to set aside the proceedings on this execution, if the judgment creditor has been guilty of any fraud, in obtaining the return of the Sheriff on the execution. It is certainly unnecessary to inquire whether the complainant would be entitled to relief in a Court of Chancery, because it will not follow, if he has, or might have a remedy by application to a Court of Chancery, that he cannot also obtain relief in a Court of Law. Still if he is not by law entitled to relief by *audita querela*, judgment must be against him, and he must seek relief in such other mode as he may be advised is adapted to the case.

There can be no doubt in this case, but that the levy of the execution was irregular, and that the injury sustained by the complainant, is of that nature that he is entitled to relief; and the Court would on motion, probably, set aside the levy. In the case of Johnson ex dem. Vanderlin & Bets *v.* Newton and others, 18 John. 355, it is decided that if the Sheriff proceed irregularly in the sale of real estate on execution, the Court, on motion, will set aside the sale; and it appears to us that there can be as little doubt but that the writ of *audita querela* is a proper remedy in this case. The process of the Court has been injuriously employed to the damage of the complainant, and he has had no opportunity of being heard in Court. And notwithstanding he might have had relief in a more summary manner by motion, yet this must be considered as a concurrent remedy.

In Hobart's Reports, between Case and Barneby it is decided that if the Sheriff on an elegit deliver a moiety of the land of the defendant which is ancient demesne, though it be admitted that this is not extendable, yet the defendant cannot avoid it by entry without an *audita querela*. It also appears from first of Roll's Abr. 305, pl. 8, between Rowe and Weeks it was adjudged, that if the Sheriff upon an elegit take an inquisition, and it appear, according to the value found, that more than a moiety of the land subject to the extent according to the value found, is delivered to the party who recovered, that this is voidable by *audita querela*. And in 4 Mass. Rep. 483, Johnson *v.* Harvey, it is decided that if an execution issue irregularly on a regular judgment, and award of execution, the remedy for the party injured is either by *audita querela* or by motion to the Court to set it aside.

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The Court are of opinion, that the complainant in this case has sustained an injury, by the proceedings on the execution set forth in his complaint, and that he is entitled to the relief prayed for in his writ. There must therefore be

Judgment for the complainant.

MINER *vs.* ROBINSON.

In Error.

If a note, not negotiable, be indorsed after it has fallen due, in an action on such note in favour of the indorsee against the indorser, parol evidence is admissible on the part of the defendant, to prove an agreement made at the time of the transfer between the indorser and indorsee, that the indorsee *should* pursue the maker of the note by action, and have recourse to the indorser only in the event of his being unable to collect the note of the maker.

Chittenden, January, 1824.

THIS was a Writ of Error brought to reverse a judgment of the County Court for the County of Chittenden, rendered in favour of George Robinson plaintiff below *v.* James Miner defendant in an action of *assumpsit*.

Heman Allen for the plaintiff in Error. He cited Chip. Rep. 86. Rhodes *v.* Risley, (ante 52.) 6 Mass. Rep. 434, Barber *v.* Prentiss. 8 T. R. 384, Rex. *v.* Laindon.

George Robinson for the defendant. He cited Chit. on Bills, 91—104. 1 Camp. Rep. 442.

The opinion of the Court was delivered by

SKINNER, Ch. J. The facts appearing upon the record in this case are, that a note was executed on the 14th September, 1821, for $68 by Thomas Lee, jr. made payable to James Miner in the month of June, 1822; that on the 5th of July Miner indorsed his name upon the note, and delivered it to James Atkins; the indorsement is left blank. Atkins delivered the note to Robinson, the nominal plaintiff to collect as attorney. Robinson, in filling the indorsement, for convenience in collecting, directed the payment to himself; and admits that the same rule is to govern the decision in the case, as if the suit was in the name of Atkins. The indorsement is

filled up by ordering the contents paid to George Robinson, value received. The note is not negotiable, and was indorsed after it fell due. Miner offered to prove on the trial, that at the time of the transfer, Atkins agreed to pursue Lee by action, and to have recourse to him (Miner) only in the event of the pursuit against Lee proving ineffectual. The County Court rejected the testimony, and this is the cause assigned for error.

If the question was, what is the undertaking of the party, which the law implies upon a blank indorsement of a note *not* originally negotiable, and *after the same falls due*, or from an indorsement ordering the contents of such note paid to another, for value received, we are not prepared to say, that by this indorsement the party indorsing is *prima facie* immediately liable on the neglect of payment by the maker, when thereto demanded, by the holder, and notice of such neglect, without any attempt on the part of the holder to enforce the collection of the money from the maker, or any evidence that such attempt would be unavailing; but we have no hesitation in saying, that if such liability is implied, it may be rebutted. Atkins having agreed at the time of the transfer to pursue Lee, the maker of the note, by suit before he had recourse to Miner, there can be no doubt, that, if the filling up of the indorsement contrary to this agreement, should in its effects prove prejudicial to Miner, an action would lie to recover the damages sustained. And it is difficult to discover on what principle Atkins is entitled to recover contrary to his agreement. The claim is not that of a *bona fide* holder ignorant of the agreement; nor is the agreement attempted to be proved contrary to an express undertaking of the party in writing.

No opinion is intended to be intimated as to the rights and duties of the holder of a note not negotiable originally, and indorsed before the same falls due; whether he will be entitled to recover of the indorser without suit against the maker; or whether to secure a right ultimately against the indorser, he is obliged to demand payment of the maker, when the note falls due, and give immediate notice of non-payment, and that he shall look to the indorser. These are questions of sufficient importance to forbid a gratuitous decision.

The question now before the Court was agitated at an early day,

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Miner vs. Robinson.

and decided in the case of Rhodes *v.* Risley (ante 52). Chief Justice Chipman in that case says, "the indorsement, though filled up by the indorsee, may be *prima facie* evidence of an obligation on the indorser, but it is only *prima facie*, evidence & in justice should be allowed to be contradicted." This decision of the Supreme Court has ever been regarded by subsequent Courts as having settled the law in this State. The same principle is recognized in England. As between the immediate parties parol evidence is admissible to control or impeach the promise or undertaking. Although the indorsement of a note is said to be equivalent to drawing a bill of exchange, and the effect is to charge the indorser as the drawer of a bill; and, although the principle may have been extended to notes not originally negotiable, yet, when the rights of third persons are not affected, and the party is not a holder having paid a value ignorant of the circumstances attending the transfer, Courts have suffered not only an inquiry into the consideration, but other circumstances, to defeat a recovery. Bul. N. P. 274. 1 Esp. R. 263, 117. Salh. 128. Str. 674. Chitty 85 and on. 8 Term R. 379. 6 Mass. Rep. 434. 11 *Ib.* 32.

We are therefore of opinion, that in the judgment of the County Court there is error, and the same is reversed.

PENNIMAN *vs.* PIERSON.

In Error.

A sound price is not *per se* a warranty of the soundness of the article sold, and the vendor of personal property, who has a title thereto, and is not guilty of any fraud in selling the same, and does not expressly warrant its soundness, is not liable for any latent defects or unsoundness therein.

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THIS was a Writ of Error brought by Penniman to reverse a judgment which Pierson had recovered against him at the County Court holden for this County in February, 1822.

The original action was commenced before a Justice of the Peace, and came to said County Court by appeal; in which Court Pierson declared against Penniman, for that whereas heretofore to wit on the 20th day of March, 1820, in consideration that the said

Pierson would purchase of the said Penniman a yoke of oxen, and would pay him therefor a certain sum, to wit, the sum of $80, he the said Penniman undertook and faithfully promised the said Pierson, that said oxen were healthy and sound; and the said Pierson says that he, confiding in the said promise and undertaking of the said Penniman, did then and there buy of the said Penniman the said yoke of oxen, and pay him therefor the said sum of $80. And the said Pierson further saith that the said Penniman hath not kept or performed his said promise and undertaking, in this behalf, because he says that one of the said oxen at the time of the sale was unhealthy, sick, and unsound, and of no value.

To this declaration the defendant in the Court below pleaded the general issue, and the Jury returned a verdict for the plaintiff; and thereupon the defendant below filed a bill of exceptions, on which this writ of error was brought.

The exceptions taken to the opinion of the Court below, will sufficiently appear by the opinion of this Court delivered by

Williams, J. On the trial of this action in the Court below, the Court were requested to charge the Jury "that they could not find a verdict against the defendant, unless the plaintiff proved an express warranty or fraud." The Court refused so to charge the Jury, and charged them, that if the defendant sold the ox, mentioned in the plaintiff's declaration, for what he was worth, if sound, the law implied a warranty.—That a sound price implies a warranty that the article sold is sound where there is no visible defect.

A bill of exceptions was tendered to this and other parts of the charge of the Court. A verdict passed for the plaintiff below, and the cause comes here on a writ of error. As the Court are of opinion that the charge before recited is erroneous, it is unnecessary to examine the other errors which are assigned.

It was a doctrine of the civil law, that a sound price implies a warranty of the soundness of the commodity sold. This doctrine has been established by a series of decisions in the State of Connecticut, and in the Courts of North Carolina and South Carolina. An opinion has been entertained by some, that the same principle has been adopted in this State, and it still has many advocates, as being the most conformable to good policy and the rules of equity and morality. But it is certain, that this is not the doctrine of the

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common law, and although an opinion was formerly current in England, that a sound price given for a horse, is tantamount to a warranty of soundness, yet when it came to be sifted it was rejected as loose and unsatisfactory. And no rule is now better established and considered as not admitting of a doubt in the Courts of Great Britain, than that the vendor of personal property, acting in good faith, not guilty of any fraud, is not responsible for any latent defects or unsoundness in the article sold, unless he has rendered himself responsible by an express warranty. The same rule has been adopted in New-York, in Pennsylvania and Massachusetts, and it is believed in most of the States of the Union. The maxim of the common law is, *caveat emptor;* and when it is known and properly understood, it cannot with propriety be said to contravene the principles of equity or morality. The purchaser can protect himself against any latent defects in the article he contracts for, by requiring an express warranty; and if this warranty be refused, it is understood both by the purchaser aud vendor, that the risque is upon the purchaser, and the price is fixed accordingly.

Indeed the rule of the common law seems to be well established, and upon reasons so satisfactory, that the Court are not at liberty to depart from it, and would have no disposition so to do, if the question were not considered as settled.

The opinion of the Court is, that a sound price is not *per se* a warranty of the soundness of the article sold, and that the vendor of personal property, who has a title thereto, and is not guilty of any fraud in selling the same, and does not expressly warrant its soundness, is not liable for any latent defects or unsoundness therein. The judgment of the County Court is therefore reversed.

CATLIN *vs.* LOWREY.

In Error.

In an action in favour of a Sheriff or other officer, on a receipt for property taken on mesne process, in which is a stipulation to return the property on demand, or pay all costs and damages, the value of the property receipted is the measure of damages.

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THIS was a Writ of Error brought to reverse a judgment of the County Court for the County of Chittenden, in an action in

favour of Heman Lowry Sheriff of Chittenden County plaintiff below *v.* Guy Catlin, on a receipt for property attached on mesne process.

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Catlin *vs.* Lowrey.

Griswold and *Follet* for the plaintiff in error.

Thompson and *Richardson* for the defendant.

The opinion of the Court was delivered by

SKINNER, Ch. J. From the bill of exceptions in this case it appears, that the plaintiff in error considered himself aggrieved, not by the judgment having been rendered in favour of the defendant in error, on the issue of fact joined to the Court, but by the decision made, as to the proof required of the plaintiff below in the assessment of damages. From the assignment of errors and the course taken by the counsel in argument, it is evident that the allowance of the bill of exceptions was obtained, supposing it necessary for the purpose of laying the foundation of a writ of error, upon which this Court might be called to decide, whether an officer, having attached personal property on mesne process, and taken therefor the receipt of a third person of the tenor described in the record (and which is the usual form in such cases) can maintain an action without showing special damage.

The undertaking, as expressed in the receipt, is to *redeliver to the Sheriff, when demanded, or pay all cost and damage.* It is said by the counsel for the plaintiff, that, as the promise is in the alternative, that is, to redeliver *or* pay the damage, the person executing the receipt may elect to pay the damage contemplated in the receipt; and this, he insists, is not the value of the property, but only such as the officer may be obliged to pay, by reason of his not having the property ready to be taken upon the execution, that may be issued upon the judgment rendered in the suit, on which the attachment is made. If the judgment has been otherwise satisfied, or no judgment has been rendered, or no writ of execution has been issued within thirty days from the time of rendering judgment, the officer is discharged from any liability to the plaintiff, and consequently can claim nothing upon the receipt. The amount of the officer's liability to the creditor is the rule of damages, and must be alleged in the declaration.

There can be no doubt such would be the law, and such ought to

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be the decision in this case, if the liability of the officer attaching was confined to the creditor alone. But his liability extends to the debtor, or the person whose property is attached, as well as to the plaintiff in the suit. He is obliged to return the property, or such part thereof as is not disposed of in satisfying the judgment, if any, to the person from whom it was taken. As he is accountable then in any event, if the property is not rendered, his damage is certain, and of course no special damage need be alleged in pleading. It evidently appears from the tenor of these receipts, that officers intend to secure to themselves a right of action at any time, when they may consider it necessary to demand the property for their own safety. The neglect of the person receipting to return on demand at any time will subject him to damages to the amount of the value of the property. The County Court indeed say, that the plaintiff below is entitled to recover the amount of the judgment rendered in the suit on which the attachment was made, unless the defendant show, that his damage is not to that amount. This undoubtedly was in reference to the judgment's having been for a sum not exceeding the value of the property. Although the rule suggested by the Court is not correct, the judgment in this case, if erroneous, is not to the prejudice of the defendant below. From the record it appears, that this was not the rule by which the damages were ultimately assessed; for the amount of the judgment of Chittenden *v.* Blood far exceeded this judgment, and it is evident the damages here allowed are not to the amount of the value of the property receipted. Judgment of the County Court is affirmed, with six per cent. interest thereon as damages for delay; and single costs will be taxed.

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1824.

BARNEY *vs.* BLISS et al.

A tender of specifick articles by the debtor, at time and place of payment, is a discharge of the contract. The creditor cannot, by neglecting to attend at time and place, to receive the property, deprive the debtor of the privilege of discharging his contract. And a tender of specifick articles, at the time and place appointed by the contract, may be made by the debtor to the creditor, in his absence, if he neglect to attend, and such tender will discharge the contract, and vest the property of the articles tendered in the creditor.

And as the law requires that the debtor do all in his power to perform, a plea that the debtor had the property ready, at time and place, and there remained through the day, ready to deliver the same, but the creditor did not attend to receive it, and that the property is still ready for the creditor, if he *will* receive it, is insufficient.

THIS was an action of *assumpsit* on a note of hand, made and executed by the defendants, bearing date the 18th of April, 1814, in and by which the defendants, for value received promised the plaintiff to pay him ten thousand feet of good merchantable pine boards, on the first day of October, 1819, at the saw-mill in Jericho, hired by the defendants of the plaintiff.

The defendants pleaded in bar, That on the day mentioned in said note for the payment thereof, to wit, on the first day of October, 1819, at the place in said note mentioned for the payment thereof, they the defendants had ten thousand feet of good merchantable pine boards sawed and prepared for the payment of said note, and were ready then and there to have paid the same, and remained there at said mill, on said first day of October, 1819, through the day, for the purpose of delivering the same, until the going down of the sun, but the said Truman did not come to receive the same; and said boards ever since have been, and still are ready for said Truman, to wit, at the mill aforesaid, if he will take the same.

Grisuold and *Follet* for the plaintiff. The question raised in this case is, whether an ability, and a mere readiness on the part of the defendant, to pay in specifick articles at the time and place appointed for the payment, unaccompanied with any other act, is of itself a a sufficient fulfilment of the contract on his part, when the plaintiff does not attend to receive the payment. We contend,

1. That in all contracts where the consideration is executed, as

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in the present case, the contract is complete and debt absolute—no condition precedent to be performed on the part of the plaintiff, nor is his presence necessary, to enable the defendant to perform his part of the contract, so far as to discharge himself from it. And in such case, the plaintiff, in order to constitute a good cause of action, need not aver in his declaration that he was ready at the time and place, to receive the payment, or make any proof of such readiness.

2. But when the consideration is executory, and the defendant's performance is to depend on some act to be done or forborne by the plaintiff, the plaintiff must aver and prove performance on his part, or render some excuse for the non-performance. 1 Chit. 309.

3. All contracts are to be construed most strongly against the contractor, and the plaintiff in this case, has a right to hold the defendants to a strict performance of their contract. And, in order to discharge themselves from an obligation payable in specifick articles, they should not only be ready with the property at the time and place appointed, but in case the plaintiff do not attend, make an actual designation of it, and set it apart, so as to vest the property in the plaintiff, that he may have the control of it when he shall chuse. It is always the duty of a debtor to do all in his power to fulfil his contract. Bray. R. 224, McConnel *v.* Hall.—Same 227, Wood *v.* Beeman. Swift's Digest 290.

4. An averment of a mere ability and readiness to perform a contract, without any other act done, is certainly too vague and uncertain to furnish any evidence of an actual performance—much less to operate as a complete discharge of the debt.

5. If the property is not designated, and separate from other property, and proof at hand of the designation, and of the quantity and quality of the articles, the creditor has no means of ascertaining or identifying the property intended to be paid to him, or whether he ought to accept it in payment or not. And if not designated on the day stipulated, any designation or tender of it afterwards could not avail him.

6. When the property is to be delivered at the creditor's house after a legal tendry made, the debtor is not bound to take any further care of it.—1 Swift's Dig. 294. In this case the boards were

to be delivered at the plaintiff's mill. If then the doctrine contended for by the defendants be correct, they need only have the property on hand, at the time and place appointed, and express a readiness to pay, and their debt is thereby discharged, and the property left, of whatever nature it might be, to be squandered or lost, without any responsibility on the part of the debtors. And the injury which consequently accrues to the plaintiff, must operate as a punishment, for non-attendance, although he might have a justifiable excuse for his neglect. A principle so absurd, it is believed cannot be maintained. The law having imposed no duty on the plaintiff to perform, he surely ought not to suffer so severely for the purpose of establishing a new principle, contrary to all former precedent in this State. If a better principle could now be established, let the Legislature, not the Courts interfere, and correct the supposed evil.

Adams for the defendants. We contend that the facts disclosed in the plea in this case are sufficient to prevent a recovery. The plaintiff claims damages because he says that the defendants have not performed their contract. It appears, however, that they sawed out the boards—had them ready at the time and place stipulated, and, if necessary, we may presume that they were measured out and separated from their other boards—that they remained there through the day ready to deliver them, but the plaintiff did not come to receive them—that the boards are still ready for the plaintiff, if he will take them.

The right of the plaintiff to change a contract of this kind into a cash debt, ought not to be allowed, but as a consequence of negligence on the part of the defendant. That these defendants have done all which they were morally bound to do, will be doubted by none. And, if there be any defect in their defence, it must arise from some rigid rule of law, having the appearance, at least, of a justification of a hard creditor, in taking advantage of his own wrong. But we will not, without examination, cast this odium upon the law.

It is said that the defendants should have tendered the boards; but it appears by the plea that the plaintiff did not attend—was not present at the time and place, to receive them: a tender therefore could *not* be made.

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It was said by the Court in the case Morton *v.* Lamb, 7 T. R. 131, that it would be absurd to state a tender to a man who was not present to receive it. So in the case of Rawson *v.* Johnson 1 East 207, it was said by opposing counsel, and not disputed, that if the party does not attend, a tender is impossible. And Lord Kenyon, in his argument in the last case, corroborates the doctrine for which we contend.—He says, "In administering justice, we must not lose sight of common sense—one party goes to do his part, but the other stays away. The party pleads that he was ready, but that the other party did not come: Would it be any answer to say, that he ought to have pleaded a tender? It cannot be necessary to go through with the useless ceremony of laying down the money, to take it up again."

The above doctrine was advanced, in relation to an averment by a plaintiff of his readiness to perform a precedent condition; but we contend that the law is the same in the case of performance of precedent conditions, as in the present case. The very term tender to a person includes the presence of the party to whom it is made. A tender without any person present to whom it is made, is a solecism.

But we contend that a readiness to perform by one party, when the other party does not attend, draws after it all the consequences of a legal tender. This doctrine is stated, 1 Swift's System 405, as sound law; "that every consequence, which would have followed by tender and refusal, will follow from being ready if the other party do not come." Bacon says, "If a party, to whom tender was to be made, was present, or if it do not apppear from the pleadings that he was absent, it must be averred that there was a refusal; but when the party to whom tender was to be made did not come, it is sufficient to allege that he was ready, and that the other party did not come." The same doctrine is maintained by Chitty 317—18. The case of Robbins *v.* Luce is to the same point. In that case, Parsons Ch. J. says, "The defendant could not tender the barrels unless the plaintiff was there. He had done all that he could do; and it was owing to the plaintiff's laches, that the contract, as written, was not performed."

But that case, if considered as an authority, expressly decides the present case. In delivering the opinion of the Court, Judge Par-

sons says, "The defendant in his plea, among other allegations, avers that on that day at his dwelling-house, he was ready to deliver the barrels to the plaintiff: if he had also averred that the plaintiff was not there to receive them, this plea, if true, would have been a good bar, and pleaded in good form." This is clearly a direct decision that the matter contained in the defendants' plea in this case is a good bar to the plaintiff's action, and that it is pleaded in good form, as there is an averment in the plea that the plaintiff did not attend to receive the boards.

The same doctrine is maintained by Richardson J. in the case Rowe *v.* Young, 2 Brod. & Bing. 165—7. And it is believed that no principle of law is better settled; there being no conflicting opinions respecting it—no contradictory decisions; and is alike supported by reason and by precedent.

If a contract be made for the delivery of specifick articles at a particular time and place, and the creditor do not attend to receive them, all the debtor *can* do, is to be ready at time and place, with the articles, ready to deliver them; of course this shall prevent a recovery of damages against him for a non-performance, as absolutely as though he had made a legal tender of the articles to the creditor, he being present; and it would be a departure from the analogy of the law to say that these facts well pleaded, shall not be a good bar of an action, brought for a non-performance of the contract.

But on the part of the pl'ff it is insisted that it was the duty of the defendants not only to have been ready with the boards at the time and place appointed; but, as the plaintiff did not attend to receive them, it was the duty of the defendants to designate the boards and set them apart, *so as to vest the property of the boards in the plaintiff.* The case of McConnel *v.* Hall is cited in support of this doctrine; but this is a case standing alone, wholly unsupported by any decided case. Where a debtor, to an action on his contract, has pleaded a tender and refusal, and has prevailed, and has thus been discharged from his contract, the property tendered has been considered as vested in the creditor; and on refusal by the debtor to deliver the property, the creditor has maintained trover for it. But in no case except that of McConnel *v.* Hall has it been decided,

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that the property of the article tendered is vested in the creditor by a tender and refusal.

Suppose in this case, that the plaintiff had attended and the defendants had measured out and tendered the boards to the plaintiff, and he had refused to receive them; and the plaintiff afterwards concluding to receive the boards which had been tendered and he had refused, called on the defendants and demanded the boards, and the defendants had refused to deliver them, do the gentlemen mean to say that the plaintiff could maintain an action of trover for the boards? I presume they alluded to such action of trover, when they said that it was necessary that the property be designated and set apart, so as to vest the property in the plaintiff, that he may have the control of it when he shall choose; "and of this there should be proof at hand." It is clear that the plaintiff in such action of trover must prove property in himself, and as he claims no title to the property except that which he has acquired by the tender of the property by the defendants, and his refusal to receive it, the burthen of proving the tender and refusal must be on him. Now although in cases of an executory consideration, it is very common for the plaintiff to rely on proof of a tender made *by himself* to the defendant, yet for the plaintiff to rely on proof of a tender *of* property made by the defendant *to himself*, would be novel, and to say the least, would be a sort of back-handed case of tender. And yet if by a tender and refusal, the property tendered be vested in the creditor, all these consequences will follow. But to support such action of trover, the plaintiff must prove still another tender; he must prove that at the time when he made demand of the property tendered, he tendered to the defendant the note on which he demanded the property, and must bring the note into Court; for, certainly he could not be permitted to recover the amount of the note, and keep the note in his own possession. It might indeed be convenient for him, for should he fail in his action of trover for the property tendered, not being able to prove that the defendant made a tender of it, he might then resort to an action on the note, and compel the defendant to prove the tender.

The defendants, in this case, satisfied that they had done all in their power to perform their contract, and that which would bar an action on the note; and as the plaintiff had on his part neglected to attend to receive the boards at the time appointed, that he

could have no legal right to them, without their assent, as it was now at their option to deliver the boards to the plaintiff, if he would receive them in satisfaction of the note, or to keep the boards and pay the amount of the note in money, they chose the former course, and have kept the boards ready, lest, on a demand and refusal, they should be subjected to the payment of the note in money, having no wish to satisfy the note with the boards, and still keep them to their own use. The above facts the defendants have pleaded in bar of the plaintiff's action on the note.—This plea the plaintiff might have traversed, in which case, as stated by Judge Parsons in the case Robbins v. Luce, if the defendants could not prove that they had the boards ready, the issue must have been found against them. But the plaintiff has chosen to demur to the plea, admitting that the defendants had the boards ready, and that they still have them ready, and that the plaintiff did not attend to receive them. This is an admission that the defendants did all in their power to perform their contract: and it was no more necessary to aver that the boards were measured out and set apart, in this plea, than in a plea of tender. In both pleas alike is included every thing necessary to be done by the defendants at the time.

Thus we have attempted to shew that the defendants' plea is adapted to the case, and is, both as to the form and matter of it, clearly supported by precedents; and that the ground on which the plaintiff seems principally to rely is wholly untenable.

The opinion of the Court was delivered by

Skinner, Ch. J. The plaintiff in this case declares upon a note of hand, in which the defendants promise to pay him 10,000 feet of good merchantable pine boards, on the 1st of October, 1819, at the saw-mill hired by the defendants of the plaintiff. The defendants plead in bar a readiness to perform at the time and place, to which plea there is a demurrer.

The first inquiry is as to the nature and effect of the defendants' plea. The principle is well settled, and questioned by no one, that if the party, on whom rests the obligation to pay a debt or perform a duty, is prevented from fulfilling his contract by the act or neglect of the other party, a *tender* will excuse him from any liability in *damages* for non-performance. If the same consequences will follow from the fact of a readiness to pay or perform, as from the fact of actual tender, it may be true that a plea of readiness, &c.

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may in such case be interposed instead of a plea of tender; but if the case is one, in which the consequences of a tender are materially different from those of a readiness to perform, and in which a tender can be made, a plea of readiness will not avail the party. There is no case in which a plea of this kind has been attempted, where a tender could be made; it is rather an excuse for not tendering. The party is bound to do all he can to perform his contract; and in this case it is readily perceived, that if a tender could be made without the presence of the other party, and that tender would have the effect to discharge the liability of the defendants upon their contract, a readiness to perform, unless it has the same effect, cannot be pleaded. If the effect of a tender is not only to discharge the debt or duty, but to change the ownership of the property tendered, the objection to a plea of readiness, &c. is too obvious to require illustration. It is not material to inquire why the practice has prevailed of pleading a tender specially in cases where the defendant is discharged thereby, and the effect is the same as an actual payment of the debt or performance of the duty. The reasons assigned for pleading a tender will hardly apply in such a case, especially in actions of *assumpsit*.

It is insisted by the defendants' counsel, that every consequence that would have resulted from an actual tender, will result from a readiness, where the creditor is absent. This is undoubtedly settled law, where the attendance of the creditor is necessary to enable the debtor to perform his contract. It is also true that a formal offer to perform in the absence of the creditor has been usually adopted, and is called in the books a tender in law, and so pleaded.

In this case no sufficient reason is, or can be assigned, why the presence of the payee could not be dispensed with. There was no precedent act to be performed by him—no appointment of appraisers, as in the case of Brooks *v.* Page—no election to be made or manifested by him. The consideration on his part is executed and past. Ten thousand feet of boards were to be delivered at the plaintiff's saw-mill, then occupied by the defendants. It would be going farther than any authority will warrant, to say that it was necessary in this case for the plaintiff, to aver and prove that he was ready at the time and place or fail of recovery; that he must be ready at his peril at the time appointed. On the other hand there is no authority to be found to support the position, that the defendants,

by the default of the creditor shall be deprived of the privilege of setting apart the specifick articles, and thereby incur at most the obligation of bailees, and not be subjected at all events in case of loss or destruction. But if, as we believe, the debt or duty is discharged by a tender, the doctrine, that the creditor cannot, by his fault, in absenting himself, prevent the debtor from effecting his discharge, follows from the plainest principles of law and common sense. It equally follows, that the latter is liable if he neglects to do all in his power to perform. The important question then is, Does the tender of specifick articles discharge the debt or duty?

The able and ingenious essay of a distinguished Jurist of the State on this subject, as well as the laboured argument of the counsel in the case, although opposed to the generally received opinion; have received all that attention and consideration, which the time and ability of the Court would permit. And was it not, that we consider the common law as settled in the case, both in England and in this country, and which we are not at liberty to disturb, we are not prepared to say, that a better rule might not perhaps be adopted.

The principle, that a tender of specifick articles according to the contract, shall discharge the debt or duty; and that the party tendering is not obliged to keep the thing tendered (as he is in the case of money) and of course is not obliged to plead that he is still ready, is very clearly recognized and held in Peytoe's case, 9 Rep. 78, and also in Co. Lit. 207. And the reasons on which it is founded seem to have been so conclusive and satisfactory, that no attempt has since been made to oppose it; nor have the inconveniences resulting from it been such as to induce the introduction of a law of consignation or deposit, as in France.* That a different rule ought to

* In the State of Ohio where contracts for the payment of specifick articles are very common, great difficulties were experienced in ascertaining what were the principles of the common law, as applicable to such contracts.

By resorting to the very ancient common law, they found that whenever a tender was pleaded, whether of money, cattle or other specifick article, it was necessary for the defendant, not only to aver in his plea that the property was still ready, but to make a profert of it in his plea, and bring it to Court, or state in his plea some excuse for not bringing it to Court. And whether brought to Court or not, if the defendant proved the tender and prevailed, the judgment was *in rem*, that the plaintiff should have the property tendered.

But they found that in the time of Lord Coke, the law had been so far altered,

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be applied in this case from that of a tender of money will appear from the reasons assigned, and which mark the distinction. Even in the case of money, to compel the debtor to keep it, and hold him liable for the debt, which he is able, and willing, and has done all in his power to discharge according to his undertaking, but is prevented by the neglect of the creditor, is opposed to common justice, and the ordinary rules of law. Where the contract is for the delivery of specifick articles, the reasons assigned for not requiring the party to go beyond his contract, and incur a further obligation, attempted to be cast upon him by the creditor, are, that goods are perishable, and that there is an expense attending the keeping; he is therefore not required to apply the care and diligence, and incur the expense necessary for their preservation and support, and which in many cases must be very considerable. The case in the 9 Coke is supported by a case decided 28. H. 8. as reported by Cappel. In the 20 Viner. 306. a case is stated thus: "If the obligation be of £60 to enfeoff the plaintiff by such a day, or deliver him a horse, that in every case of a tender, in performance of the condition of a penal bond, and in every other case where the plaintiff sought a forfeiture, if the defendant prevailed in his plea, the condition was performed, the debt discharged, and the property tendered lost to the creditor, being forfeited by his wrongful refusal to receive it, and still remaining the property of the debtor.

The prevailing opinion in the State of Ohio seems to have been that this rule of the common law had remained unaltered, except that it had been extended to all cases of a tender of specifick articles. Some, however held, that the reason of the law in this case had ceased, and with it the law had ceased also. And that as property was no longer lost by a tender and refusal, the principles of the ancient common law applied of course, and that it was necessary for the debtor to keep the property tendered, and to plead the tender with an *uncore prist*, that it is still ready.

At length these questions were put at rest by an act of the Legislature, passed in the year 1816, by which it was provided, "That upon tender pleaded to an obligation or promise for the payment of any other thing than money, the Jury, if they find for the defendant, shall assess the value of the property tendered: and judgment shall be rendered in favour of the plaintiff for that amout, without interest or cost, unless the defendant shall forthwith perform his contract, or give the plaintiff such assurance, as the Court shall approve, that he will perform the same within such time as the Court may direct, in which case judgment shall be entered for the defendant."

The same act also provides, "That if perishable articles be tendered by the debtor, they shall be kept by him, from the time of the tender, with reasonable care, at the expense and risque of the creditor."

or such like, *which is not money*, tender by the defendant and refusal by the plaintiff is sufficient for the defendant forever." In the same book (p. 310) in another case the same principle is found. We are not apprized of any decision in this State opposed to this doctrine; but in the case of McConnel *v.* Hall, the Supreme Court very decidedly approve the principle. The Court there say, "The promissor, after a fulfilment of his contract, is not bound to keep the property always ready, as in case of tender of money; he must therefore make such designation of the article, on the day, and at the place of payment, as will transfer the property to the promisee, and enable him to pursue the property itself."

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In Connecticut and New-York the question is considered at rest by repeated decisions. Judge Swift says, "It may be laid down as a general rule, that when contracts are made for the delivery of goods, or any article other than money, a tender of the thing contracted for according to the contract, though refused to be accepted by the promisee, absolutely discharges the contract." In the 8 John. R. 478, the Court say as to the effect of the tender, "We consider it a complete bar to the suit upon the contract." And from the reports of cases in New-Hampshire and North Carolina, it appears the same doctrine has been approved in those States.

Judgment, plea in bar is insufficient.

Higley *vs.* Smith and Boyden.

If an Administrator, under an order of the Court of Probate, sell real estate of his intestate, and, to secure the payment of the purchase money, take to himself as Administrator, a mortgage of the same or other estate, and such mortgage be foreclosed, the title of the estate so mortgaged, vests in the Administrator in his private capacity; and if he again convey the same estate as Administrator, his title will pass by the deed, and covenants contained in the deed will create a personal obligation on him.

A purchaser of real estate, may protect his purchase by such covenants as he may deem necessary, but if he accept a quit-claim deed, a mere failure of title furnishes no ground for recovering back the purchase money.

THIS was an action for money had and received, and for monies paid, &c.

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On trial upon the general issue, at January term, 1822, the plaintiff, in support of the issue on his part, offered evidence of facts to make out the following case:—That on the 7th day of September, 1814, the defendants as administrators of Silas Smith, late of Shoreham, deceased, conveyed to the plaintiff by their deed of that date, a certain farm of land, being part of the estate of said Silas Smith deceased, pursuant to an order of the Court of Probate, directing a sale of the real estate of the said Silas deceased, for the payment of the debts against said estate. On the receipt of which deed, the plaintiff paid to the defendants in part of the purchase money a sum sufficient to pay all the debts against the estate of the said Silas deceased, and executed a mortgage deed of the premises to the defendants to secure the payment of the remaining part of the purchase money. On which said mortgage deed the defendants afterwards brought an action of ejectment for said premises, by which they obtained a foreclosure of the mortgage and possession of the premises. And afterwards, to wit, on the 6th day of May, 1818, the plaintiff again purchased the same premises of the defendants, who without any order of sale from the Court of Probate, executed and delivered a quit-claim deed of the premises, of which the following is a copy:

"Know all men by these presents that we Jonathan Boyden, Jr. and Stephen Smith, Jr. both of Shoreham aforesaid, administrators of Silas Smith, late of said Shoreham deceased, in consideration of the sum of nineteen hundred and fifty dollars current money of the United States, received in full to our satisfaction of Jesse Higley of Shoreham aforesaid, the receipt whereof we do hereby acknowledge, have remised, released and have forever quit-claimed, and by these presents do remise, release and forever quit-claim, in our said capacity unto the said Jesse Higley, his heirs and assigns forever, all our right, title and interest in and unto a certain tract of land lying and being in Shoreham aforesaid, and described as follows, To have and to hold the above remised and released premises, with all the privileges and appurtenance thereof, to him the said Jesse Higley, his heirs and assigns forever. And we do hereby in the capacity of administrators as aforesaid, covenant with the said Jesse Higley, his heirs and assigns, that we will warrant and defend the premises above mentioned against all lawful claims of any person or persons whatever, claiming from or under us in our said ca-

pacity of administrators as aforesaid." On the delivery of which deed, the plaintiff paid to the defendants five hundred dollars in part of said purchase money, and executed and delivered to the defendants a mortgage deed of the same premises, to secure the payment of the remaining part of the purchase money. Afterwards the defendants, as administrators as aforesaid, commenced an action of ejectment on the said last mentioned mortgage deed for the same premises, and recovered judgment thereon against the present plaintiff; on which, upon application of the said Higley, the usual time of redemption was set and expired, and possession taken by said administrators, under said judgment. And afterwards the same land was set off by order of the Court of Probate to the heirs of said Silas Smith deceased.

The Court excluded the evidence offered on the part of the plaintiff, and a verdict passed for the defendants. The plaintiff filed a motion for a new trial founded on the rejection of said evidence, on which the cause came on to be heard at the present term.

Phelps and *Holley* for the plaintiff. The plaintiff, in this case, claims a right to recover back the money paid for the land upon the last purchase in the year 1818, upon the ground of a total failure of the consideration. The deed from the defendants to the plaintiff, was wholly inoperative as to conveying a title. It purports to convey only their title as administrators of Smith; but they had no authority from the Court of Probate to make the conveyance. The order of sale for the payment of debts, had performed its office upon the first sale, as it produced a sufficient sum to pay all the debts of the intestate. The order then was *functus officio* and warranted no further sale of the estate. Such must be the case, as it is only for the payment of debts that the Court of Probate has power to order a sale, and when this purpose is answered, the power of the Court ceases. But if we are incorrect in this, yet nothing passed by the deed; for by the first sale the land was severed from the assets in the hands of the administrators, and when it reverted by a foreclosure of the mortgage, it vested in the defendants in their private or individual capacity. It is doubtful whether they held it even in trust for the estate; if they did, yet the legal title was in them to all intents and purposes.

It is, indeed, immaterial, whether the legal title be considered as

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vested in the defendants in their personal, or representative capacity. In the one case, the deed, through the mistake of the parties, was inoperative, and in the other, was void, for want of authority to make it; it must therefore be considered nugatory at all events.

It is obvious that the title of the defendants was the thing contracted for. This title, whatever it was, did not pass, but remained in the defendants, as before. There is, therefore, a total failure of the consideration for which the money was paid. And if there be a failure of consideration, the circumstance that the contract related to lands, and that there are covenants in the deed makes no difference. There is no distinction as to the operation of a sale, between contracts for real, and contracts for personal estate; there is evidently none in reason; and if we consider the thing contracted for to be the grantor's title, it will be found there is none in law.

It is true that when the grantor does legally convey all the title which is in him, & secures it by such covenants as are stipulated for, there can be no ground for recovering back the consideration altho' the title prove defective. The reason is obvious. The title of the grantor is the thing contracted for; if that pass, there is no failure of consideration, although it prove defective; but when the title does not pass, it is otherwise.

It is a settled rule that a party who has contracted for the purchase of real estate, and has made a deposit, may abandon the contract before conveyance is executed, and recover back his deposit. And there is certainly no difference between cases in which no conveyance has, in fact been made, and where the conveyance is inoperative. There is, indeed, this difference between cases of real and personal estate—in the former case there is no implied warranty as to the title contracted for; but the ground of our claim in this case is not that the title contracted for is defective, but that it was never conveyed to us. Sugden L. of V. 313. Peak Rep. 94. 3 Bos. & Pul. 162. 7 Mass. 14—30. 1 Day 167. 2 Day 252—437. 1 Dall. 428. 11 John. 50. 6 T. Rep. 606.

The circumstance that there were no covenants in the deed is of no importance; for the covenants relate to the sufficiency of the title, and have no bearing on the validity of the conveyance: the remedy sought, in this case, is not within their province, and the contingency on which we rely is wholly foreign to their purpose. 2 T. Rep. 483—note.

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It has been decided that the covenants in a deed are a sufficient consideration for a note, or for the payment of money, and that such a note could not be resisted on the ground that the title is bad; the case would be the same, if the deed contained no covenants. But when the title does not pass at all, the covenants are no consideration; for in such case there is nothing for the covenants to operate upon.

The sale of a title to real estate is analogous to a sale of personal estate with a warranty as to quality, in which case the warranty is inoperative if the title do not pass. Besides the mere personal covenant, abstracted from the title of the grantor, is not the thing contracted for; it is a mere incident to the title, and is of no use or value without it. The defendants' covenant was a consideration in this case, only as connected with their title; independant of that, it is a totally different thing from that contracted for. There is, therefore, a failure of consideration as to the covenants.

Finally, the same mistake, which prevented the title's passing, renders the covenant nugatory, as to the purpose intended by it. The moment the mistake is discovered, the covenant becomes total ly a different thing from what the parties intended.

Although it is true, that when a party attempts to enforce a contract under seal, he cannot maintain *assumpsit;* yet, where he has a right to abandon the contract, or there is an absolute failure of consideration, he may recover in an action for money had and received. So it is in cases of agreements under seal for the purchase of real estate, and in cases of the purchase of an annuity, which has been set aside.—So in the cases cited, where the money paid was recovered back, the conveyances were by deed with warranty.

The covenant in this case is a limited warranty, and furnishes no security against the acts of the defendants. The plaintiff was to take the title, in all other respects at his own risque. If he gets the title and it proves defective, he has no remedy unless the covenants afford one. But the ground of our claim is not that the title is defective, but that it was never conveyed to us; it still remains in the defendants, as before. This covenant, therefore, is no more an answer to our claim, than a warranty that a horse was free from the glanders, would be an answer to a claim for the money paid, because the horse was not delivered. Suppose the defendants had

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previously conveyed their right as administrators, what remedy has the plaintiff on this covenant of warranty?—he could shew no title to be protected, and, of course could shew no claim to damages; if he were to resort to that covenant it could furnish him no relief. The result is, that there is, in this case, a total failure of consideration, and the plaintiff is entitled to recover back the money paid.

Bates and *Everest* for the defendants. The question which first arises upon the facts stated in this case is, whether Higley, the plaintiff, would have been secure in his title to the land, and, therefore, safe in paying the consideration. As to this question the defendants contend,

1. The first deed and mortgage in the case, being in their nature a conditional sale, and the condition not performed, no sale was completed; the administrator's authority to sell was not exhausted, but remained to support the second conveyance.

2. But if the order of sale did not authorize the administrators to secure the payment by mortgage, then the firt deed, which the administrators gave Higley, must be taken to have been an execution of the power, and the mortgage a security to the administrators on their own account, and, the lands coming back, belonged to them in their private right. And as their quit-claim deed to Higley upon the second sale, could not operate in their capacity of administrators, it bound them as private persons, or rather passed their title. 8 Mass. 162. Sumner et al. *v.* Williams et al.

3. Higley would have been safe in paying the money, because when it was payable, and when the mortgage was foreclosed, the Court of Probate had previously in the presence of the heirs and administrators, considered the land as sold, and decreed the administrators to pay the money arising from the sale, and no appeal was taken from this decree. Under these circumstances, neither the heirs nor administrators, could have disturbed his title. The heirs would have been precluded by this decree, and the administrators estopped by their deed to Higley.

Further objections to this action in its present form, may be urged on the following principles:

1. If there was any contract or warranty, as to their authority to sell, as administrators, it arises not from parol, but from the *fact* of selling, as appears on the face of the deed; of course, if this act

amount to a warranty, it is a constructive covenant in the deed. And when money is paid on a contract by deed with covenants, there cannot be an implied promise to pay it back. The grantee must rely on the covenants in his deed—express or constructive, or must shew a fraud. 2 T. Rep. 100, Toussaint et al. *v.* Martinnant. 6 T. Rep. 606, Crips *v.* Reade—Fonblanque Equity, 372 in notes.

2. A contract cannot be wholly rescinded, and an action of *assumpsit* maintained for the money paid, unless the parties can be put in *statu quo;* but in this case, Higley had the possession and valuable use of the land for several years. 5 East 449, Hunt *v.* Silk. 4 Bos. & Pul. 260, Taylor *v.* How.

The opinion of the Court was delivered by

WILLIAMS, J. The plaintiff claims a right to recover in this case, on the ground of a want of consideration for the sum paid to the defendants on the last purchase. He contends that the deed executed in May, 1818, was wholly inoperative as to conveying any title. And that the title attempted to be conveyed still remains in the defendants, as before the quit-claim deed was executed.—That if the title was, at the time this deed was executed, vested in the defendants, in their personal or private capacity, the deed was inoperative, inasmuch as it purports to convey their title as administrators. And, if the title was in them, in their representative capacity, the deed was void for want of authority to make it, the administrators having before sold real estate in pursuance of the order of the Court of Probate, sufficient for the purpose for which the sale was authorized; and that purpose having been once answered, the power ceased. If these premises were correct, it would not follow that the plaintiff is entitled to recover in this action. The deed which was executed by the defendants, purported to convey to the plaintiff in this action a certain tract of land, and the plaintiff might have protected his purchase, by such covenants as he deemed necessary for securing his title. If they attempted to convey as administrators, they could have been required to covenant that they were duly authorized.

This does not compare with that class of cases where the purchaser, who has paid the purchase money and has been ousted, before the conveyance is executed, has been permitted to recover

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back the money paid in this form of action. Nor does it appear from the facts offered to be given in evidence, that the plaintiff was evicted from the land, in consequence of any defect in the title conveyed to him by the defendants; but on the contrary the recovery was had by these defendants, by virtue of the mortgage deed executed by the plaintiff, on the forfeiture of the lands therein granted, by reason of the non-performance by the plaintiff, of the condition threin contained. And we cannot say that this case is similar to any of those which have been cited, where this form of action has been maintained. It is unnecessary however, to examine those cases particularly, as the case is, on another ground clearly with the defendants.

The defendants, as administrators, had no interest in the land of their intestate. By virtue of their appointment as administrators they had only an authority to sell for the purposes which the law designates, when thereto authorized by the Court of Probate.— When thus authorized, they can pass to a purchaser, whatever title their intestate had, and take such security for the purchase money as may be satisfactory to themselves, either by a mortgage of the same land or of any other land, or in any other way, but they are at all events accountable for the sum for which they sell. If they take security by mortgage, on the foreclosure of the mortgage, whatever title was conveyed by the mortgage deed, becomes absolute in them in their individual capacity. It follows from this, that the defendants by their deed executed in September, 1814, complied with the order of the Court of Probate, and had no further authority to sell the real estate of their intestate, by virtue of that order. And on the foreclosure of the mortgage executed by Higley at that time, whatever title he derived to the land by the administrators' deed to him became vested and absolute in them in their individual capacity; and no order from the Court of Probate was required to entitle them to convey the land the title of which was thus vested in them. The only inquiry then is, whether by the deed of May, 1818, this title was conveyed to the plaintiff. The deed purports to convey all their the defendants' title. The grantors do not say that they convey in pursuance of any authority from the Court of Probate, or that they convey the title of their intestate, but all their right. It is true they describe themselves as administrators.

and in that capacity quit-claim to the plaintiff, and covenant in that capacity to warrant and defend the land granted. Describing themselves as administrators, is merely descriptive of the character in which they had acted, or the manner in which the estate came to them. And the covenant of warranty, notwithstanding they use the expression, "in our capacity as administrators," binds them personally. 8 Mass. 162, Sumner administator *v.* Williams et al. 3 Barnwell and Anderson 47, Burrell *v.* Jones. 2 Brod & Bing. 460, Childs *v.* Monins et al.

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The defendants, as administrators, could have no title to pass; they had no authority at that time to convey any real estate of their intestate, and they could make no covenant which could affect the estate which they represented. On the whole the Court are of opinion, that the deed executed by the defendants, in May, 1818, passed the title of the defendants to the land in question, to the plaintiff; and the covenant of warranty contained in the deed created a persnal obligation on the defendants.

The plaintiff takes nothing by his motion, and judgment must be entered on the verdict.

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That the persons sitting as judges, holding a Court and rendering a judgment, were not qualified as judges, cannot be assigned for Error, such assignment of Error being an allegation that the proceedings are a nullity, that there is no record to be examined—no judgment to be reversed.

THIS was a Writ of Error brought to reverse a judgment of the City Court of the City of Vergennes. By the record it appears, that a suit was brought by Wheeler *v.* Adams before that Court, which was referred by agreement of parties, and the judgment was rendered on the report of the referees.

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The law requires that certain oaths be administered to the Mayor and Aldermen of said City, the Mayor and the two seignior Aldermen composing said City Court; and that a certificate of such oath, under the hand of the person administering the same, shall be recorded, before the person taking the oath shall be capable of exer-

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cising his office. The error assigned is, that the persons holding said Court, had not, at the time said judgment was rendered, taken the oath, nor was there any certificate of their having taken said oath recorded.

Edmonds and *Phelps* for the plaintiff in error.

Bates for the defendant. This objection to the qualification of the Judges ought to have been raised dy a plea in abatement, and cannot be assigned for error. 1 Chit. 434. 2 Saunders' Rep. 101, note 9. A writ of error presupposes a judgment. A pretended judgment, by individuals wholly unauthorized, would be a nullity; consequently, a writ of error could not be sustained to set it aside. And yet the plaintiff in this case is obliged to take the ground that the Judges had no authority whatever. 2 Coke 359, Whistler *v.* Lee.

The record sets forth a judgment of the City Court of the City of Vergennes. The error assigned is, in effect, that there was no such Court, which is a contradiction of the record, and, therefore, inadmissible. 2 Bac. 490. 2 Croke 350. 2 Levins 243.

The City Court of Vergennes, is within its local limits a Court of general jurisdiction, and an averment that the Judges of said Court were not qualified, is inadmissible on principles of propriety and policy. If a certificate of their being sworn is not found on record, according to the provisions of the statute, it is to be presumed that the recording officer has failed in his duty, not that the Judges omitted to take the requisite oath of office.

Skinner, J. delivered the opinion of the Court. It will not be necessary in this case to decide, whether the neglect to take the oath, and to have a record thereof made, by the Mayor and Aldermen, they having been duly appointed, chosen, and acted in their official capacity, will render their proceedings void or not.—Nor is it necessary to decide what effect the appearance of the defendant in a suit, and agreement to refer by rule of Court, may have upon the judgment, if, as the Court consider, a writ of error is not the proper remedy of the party complaining; that is to say, if the causes here alleged cannot be assigned for error. If the proceeding is not warranted by law, the judgment is not voidable, but void. Where the subject matter is not within the jurisdiction of the Court, the judgment is said to be void—the pro-

ceedings being *coram non judice*. The defect however, on which the plaintiff relies in this case, is not, that the subject matter is not within the jurisdiction of the Court rendering the judgment; the existence of the Court for any purpose is virtually denied. And this must be the true cause of complaint, if any. In the case of Baptist *v.* Mickelbourn, cited by the plaintiff's counsel, the question was not raised whether error would lie, where the proceedings were *coram non judice;* although the report of the case states, that "the Court held the judgment void, yet error lies." The question was, whether the parties were within the jurisdiction of the Court or not; and a majority of the Court were in favour of the defendant in error. No question could arise as to the existence of the court. The same principle seems to be recognized in the case of Hipley *v.* Tuck by a majority of the Court. The decision however was opposed by Wild, and is denied by Ld. Holt to be good law. And in that case it is said it cannot be alleged for error, that the person rendering the judgment complained of, was *not judge*. In the case of Whistler *v.* Lee in Cro. Jac. the error assigned is, that the person holding the court, which is stated, as appears from the record, to have been by custom, had no authority, that is, that there was no such custom; and the grounds on which the decision against the plaintiff in error in that case rested, are, that the averment is contrary to the record, and also, if there is no such custom, then the proceedings are *coram non judice*, and the party is not aggrieved thereby, but he may have false imprisonment. That the party cannot deny the existence of the Court rendering the judgment complained of, or assign that for error in a record, which shows there is no record, is supported by reason and authority.

In the several ancient cases of Mellius *v.* Wheatley, Arundell *v.* Arundell, Whistler *v.* Lee, and Deming *v.* Norris, although there is some obscurity, and not that perfect consistency, which might have been expected upon a subject of no more intricacy, the doctrine, that "the suit by the writ of error admits it to be a Court"—that is, the legitimate existence of the Court rendering the judgment is acknowledged by the party's complaining of error in the record, and seeking to set aside the judgment, is fully established.

We entertain no doubts in the case. The proceedings of persons acting in a private capacity, whatever form they may assume, cannot be re-examined by a writ of error. There is no judgment

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to be affirmed or reversed; there can be no record or exemplification of one. In this case the proceedings are such, or full credit must be given to them, as the proceedings of a Court.

Judgment therefore is affirmed.

Judge of Probate *vs.* FILLMORE,—BUEL and Wife, Prosecutors.

If an administrator neglect or refuse to pay to the heir, the sum which the Court of Probate has, on a distribution of the estate, decreed to be paid to him, within the time limited by such decree, if demanded, it is a breach of the condition of the administration bond, and an action will lie on the bond immediately, a previous suit against the administrator being unnecessary.

The regularity of the proceedings of a Court of Probate preparatory to a decree, cannot be inquired into in a suit founded on such decree; such decree being conclusive, if the subject matter of the decree be within the jurisdiction of the Court, and cannot be set aside but by appeal.

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THIS was an action of debt on bond. In the declaration the bond was set forth in common form, with the following condition, and specifick breaches of the condition: "If the above bounden E. Fillmore, administrator of all and singular the goods, chattels, rights, credits and estate of Nathan Colgrove, late of ——— deceased, shall make, or cause to be made a true and perfect inventory, of all and singular the goods, chattels, rights, credits and estate of the said deceased, which had or should come to the hands, possession or knowledge of the said E. Fillmore, or into the hands or possession of any other person or persons for him; and the same shall exhibit or cause to be exhibited unto the Registry of said Court of Probate, at or before the 25th day of December next ensuing: and the same goods and chattels, rights, credits and estate, and all other of the goods, chattels, rights, credits and estate of the said deceased, at the time of his death, which at any time after shall come into the hands or possession of the said E. Fillmore, or into the hands or possession of any other person or persons for him, shall well and truly administer according to law; and further, shall make or cause to be made a true and just account of his administration at or before the —— day of ———. And all the rest and residue of

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the said goods, chattels, rights, credits and estate which shall be found remaining upon the said administrators' account (the same first being examined and allowed by the Court of Probate) shall deliver and pay to such persons respectively, as the said Court of Probate, by their decree or sentence, pursuant to the true intent and meaning of the law, shall limit and appoint: And if, &c.—Then the said obligation to be void and of no effect, or else to remain in full force and virtue." And the plaintiff saith, that after the making of the said obligation as aforesaid, to wit, at a Court of Probate holden at Rutland in said District, on the second Monday of May, 1822, on application of Gideon Buel and Phebe his wife, daughter of the said Nathan deceased, the said E. Fillmore administrator as aforesaid, and the heirs of the said Nathan, having been notified, pursuant to the order of said Court, that a division would that day be made of the estate of the said Nathan, remaining in the hands of the said E. Fillmore administrator as aforesaid, it was among other things ordered and decreed by said Probate Court, that the said E. Fillmore administrator as aforesaid, pay the said Phebe Buel wife of said Gideon Buel, one eighth part or share of the sum of $479 96 then found remaining in the hands of the said administrator, being $59 90, within ten days from said second Monday of May, 1822. And as an assignment of a breach of the condition of said bond, according to the form of the statute in such cases made and provided, the plaintiff says that the said E. Fillmore, although requested on the first day of October, 1822, has not as yet paid to the said Gideon Buel and Phebe his wife the said sum of $59 90, or any part thereof, although the said term of ten days from the making of the said order or decree of the Probate Court has long since expired. By reason of which premises the said Gideon and Phebe his wife have sustained damages to a large amount, to wit, the sum of one hundred dollars, and thereby an action has accrued to the plaintiff to have and recover of the defendant the sum of ——— above demanded, &c.

To this declaration there was a general demurrer and joinder.

Langdon for the defendant. We contend that the declaration in this case is wholly insufficient, and shall insist on the following causes of demurrer:

1. For that the dividend set forth in the plaintiff's declaration

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was not made according to law; the statute requiring that the same be made by a committee to be appointed by the Court of Probate. Stat. 1 vol. 132, sec. 31, and p. 135, sec. 41.

2. It does not appear by the declaration, that the Court of Probate issued an order of notice to the administrator or heirs, nor does it appear that they ever had any actual or legal notice that a distribution of said estate would be made at the time mentioned in the declaration, which is necessary to render it legal and valid; for the Court of Probate is a Court of limited jurisdiction, and it ought to appear by the records of their proceedings that the Court has proceeded according to law.

3. It does not appear from the declaration that the sum ordered to be paid could not be collected of the administrator, which is necessary to be stated and proved, before an action can be maintained on the bond, to recover that sum of the bail.

Page, for the plaintiff, insisted that there was no foundation for either of the exceptions taken to the declaration. The law he contended, does not require the appointment of a committee of distribution, in a case where money only is to be divided. Stat. 1821, 46, 58. 1 vol. Comp. Laws, 130, 135.

But, if we are incorrect as to this, yet, the proceedings before the Court of Probate in this case, being a Court of competent jurisdiction, and having jurisdiction of the subject matter, their validity cannot be inquired into collaterally in this action; but the defendant having been notified of the time and place of making the decree, ought to have appealed therefrom, if he felt himself aggrieved; not having done so, he is now concluded by it. 1 Phil. Ev. 223, 262. 2 Bur. 1009, Moses *v.* McFarland.

The opinion of the Court was delivered by

WILLIAMS, J. The defendant contends in this case that the declaration is insufficient, for that the distribution among the heirs of the estate of Nathan Colgrove was not made in the manner pointed out by the statute, as it was not made by a committee appointed for that purpose. It is apparent, however, by an examination of the statute, that the appointment of a committe is required in those cases only, where estate real or personal is to be appraised and to be specifically set to the heirs. If the estate consists of money only, in the hands of the administrator, the interference of a commit-

tee is not necessary; but the Court of Probate may, after ascertaining the proportion to which each one is entitled, order that the administrator pay the same.

It is further urged on the part of the defendant, that it does not appear from the declaration, that the administrator or heirs had any legal or actual notice that distribution of said estate was to be made. No particular form of notice is pointed out by the statute, nor is it any where expressly enacted that notice shall be given to the administrator or heirs, when a decree of distribution is to be made.—No decree, however, ought to be made, affecting the rights of any person, unless he is notified. But the conclusive answer to this objection is, that the Court of Probate had jurisdiction of the subject matter, and the decree must be presumed to have been made on previous regular proceedings; and it could not have been necessary in the declaration to set forth those proceedings, or any thing more than the decree; for if the proceedings previous to the decree, and which were necessary to be had before making it, were erroneous, the decree could be set aside only by appeal, and until set aside it is conclusive. Bray. Rep. 18, Collins *v.* Crane. 1 Con. Rep. 467, Brown et al. *v.* Lanman.

It is further contended that it should appear from the declaration, that the sums ordered to be paid could not be collected of the administrator, for that unless this appear, no suit can be maintained on the bond. There is no ground for this exception. It is set forth in the declaration, that the administrator was ordered to pay the prosecutors the sum due them by a certain day; and that the administrator, although particularly demanded, hath not paid the same. One of the conditions of the bond is, "that all the rest and residue of the said goods, chattels, rights, credits or estate, which should be found remaining upon the administrator's account, he should deliver and pay to such persons respectively, as the said Court of Probate by their decree or sentence, pursuant to the true intent and meaning of the law, shall limit and appoint." This neglect then to pay the sum to the prosecutors decreed by the Court of Probate, pursuant to that decree, was clearly a breach of this condition of the bond. There must therefore be

Judgment for the plaintiff.

Rutland, January, 1824.

DANIEL SMITH and others *vs.* MEACHAM.

Where the proprietors of a town, at a proprietors' meeting, make a division of the town into severalty, by voting to the persons claiming the different rights, certain lots in lieu of their drafts, such votes are no evidence of title, not even *prima facie* evidence of title as against each other.

THIS was an action of ejectment for a lot of land in Rutland, containing sixty acres, laid as a third division to the rights of John Dandley, Oliver Colborn and Thomas Blanchard. On trial upon the general issue, at February term, 1823, it appeared in evidence, that in the year 1793 the proprietors of said Rutland made a division of said town into severalty, as appeared by the records of the proprietors' meetings and plan of the allotment.—That said division was not made agreeably to any existing law, but had been acquiesced in, and that the lands in the town are still holden under said division. It further appeared that most of the lots in town were voted to the proprietors in lieu of their drafts. And that at a meeting of the proprietors holden on the 13th day of November, 1793, they voted to Capt. John Smith, ancestor of the plaintiffs, the lot in question, as a third division of the rights of John Dandley, Oliver Colborn and Thomas Blanchard, containing eighty acres, twenty acres to each of said rights.—That the said proprietors, at the same meeting, voted to Col. James Mead Lot No. —— as a third division of the right of John Melvin, containing sixty acres, and lying south of and adjoining the aforesaid lot voted to said Smith.—That the defendant claimed the last mentioned lot by virtue of a deed from said James Mead, bounding said lot north on said lot of John Smith.—That the defendant exhibited no title or claim to the land in question, unless it was contained within said eighty acre lot, which he had purchased of James Mead, but did claim a part of the sixty acre lot, being the land in question, as included in his said eighty acre lot. It further appeared that the plaintiffs were the heirs at law of the said John Smith, deceased.

The plaintiffs insisted that upon the aforesaid evidence they were entitled to recover against the defendant the land described in his declaration, if the Jury should find it to be included within the boundaries of said lot voted to John Smith, and not in the said lot voted to James Mead.

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The Court decided that the plaintiffs were not entitled to recover, as they had shewn no title to said land, either by deed from the original proprietors, by the statute of limitations, or by prior occupancy. Verdict for the defendant.

The plaintiff excepted to the opinion of the Court, and filed a motion for a new trial—on which the cause came on to be heard at the present term.

D. Chipman for the plaintiffs. To entitle the plaintiffs to recover in this case, it is necessary for them to make out a good title against the defendant—not an absolute good title against all others. From the facts admitted in the case there is room to suppose that there may be a better title in some third person. As in the case where both plaintiff and defendant claim title from the same source, the plaintiff recovers if he show the best title from the common source, yet there is no greater probability that the plaintiff's title is good because the defendant claims from the same source—nay, not so great, for in most cases the title is rendered more suspicious. But the defendant's claim itself renders the plaintiff's title, imperfect in itself, good against the defendant. So in this case, although the plaintiffs have not shewn a title in themselves either by deed from the original proprietor, by the statute of limitations, or by prior occupancy, yet we hope it will appear to the Court that we have shewn in them a title good against the defendant; that they have a legal right to recover and hold the land against him.

Were this a solitary case, the questions arising in it would be quite unimportant; but when we consider that great numbers in the State, and a great portion of the inhabitants of this town stand in the same relation to each other respecting their possessions, as do the parties before the Court, the case assumes a high degree of importance.

So long a time had elapsed between the grants of these townships by the Governor of New-Hampshire, and the settlements under those grants, and no office for recording of deeds until after the organization of this government, that speculators found that they could sell lands as well without purchasing them, as to pay their money for them; hence a great portion of the settlers went into possession without a valid title. True, a great portion of them are secured in their possessions by the statute of limitations. But in

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cases like the present, where the dispute is in relation to boundaries, the statute affords no security except the disputed ground has been actually improved fifteen years. In this case the plaintiffs and defendant disagreed, in relation to the line between their two lots. The plaintiffs left their lot unimproved and kept it for a timber-lot; the defendant lived on his lot, and within a few years past extended his improvements on to the plaintiffs' lot across the disputed ground. The plaintiffs brought the present action to settle that dispute; the defendant as appears by the case never pretended any claim to the plaintiffs' lot, but claimed the land in question as within the boundaries of his lot which he purchased of Mead. They both come to Court with their witnesses each to establish the line to which he claimed. But this question was put at rest and the defendant left in possession, because the plaintiffs could at this late day trace no title from the New-Hampshire proprietors to John Smith. Indeed it does not appear that either party has any title or claim to the land in question, except what was derived from the votes of the proprietors assigning the plaintiffs' lot to John Smith and the defendant's lot to James Mead—a claim which until this time has been undisputed. It remains then to inquire into the validity of this claim as between the two parties.

When this proprietors' meeting was holden, no one of the original grantees could have been present; they had all passed off the stage, and others held their rights by descent, purchase, &c. When, therefore, the meeting was warned, and the proprietors assembled, how could they know each other, or their titles to their rights respectively? And who, by virtue of his title, had a right to vote in the meeting as a proprietor, as having an interest in the common property?—Those, and those only, who at that day could exhibit satisfactory evidence of title to one or more rights in the town. Now we will suppose that every individual right in the town was thus represented at the meeting, and the proprietors proceeded to make a survey and allotment, and to agree what particular lot each one should have, and to vote the lots accordingly. And suppose this division became valid by long acquiescence, or rather take it to be a legal division, when made, as clearly in point of law it would be.—One of these proprietors goes into possession of his own lot under the proceedings of the proprietors, but not content with that,

enters upon an adjoining lot, assigned to another proprietor, without any pretence of claim. When prosecuted for the trespass by the proprietor to whom the lot was assigned, could he be permitted to controvert the plaintiff's title to the right to which the lot had been assigned, which the proprietors, of which he the defendant was one, had expressly admitted?—We think not. It is very obvious that such vote of proprietors amounts to such admission. When the proprietors voted that James Mead should have the eighty acre lot as a third division to the right of John Melvin, it was a direct admission that James Mead was the owner of that right. There was the same admission of ownership in John Smith, when they voted to him the sixty acre lot.

It remains then only to shew that the case before the Court is a case the same in substance as the case stated; so plainly so, that it seems hardly necessary to premise, that every presumption is to be raised in support of that which is obviously just and right, which shall confine the parties in this case, to the matter of contention which brought them into this Court—a dispute in relation to boundaries. And we cannot think it is presuming too much in this case, to say that every proprietor was present at the meeting, and gave his assent to every vote which was passed; but this is unnecessary. It is enough that James Mead and John Smith, under whom the parties claim, were present, and thus acting at the meeting. John Smith admitted that James Mead was the owner of the right of John Melvin, and agreed that he should have the eighty acre lot as a third division to that right, and James Mead admitted that John Smith was the owner of the said three rights claimed by him, and agreed that he should hold the sixty acre lot on the third division of these rights. Surely this gave to each a valid title to his lot as against the other; although a third person might show a paramount title to all the rights above named, and oust them both. But the plaintiffs, as heirs of John Smith, and the defendant grantee of James Mead, stand in the same relation respecting these lots as did John Smith and James Mead. Thus we trust it has been shown, that law and justice unite in calling for a new trial in this case.

Page for the defendant. This is the first attempt that I have ever known made by a plaintiff in ejectment, to recover without ti-

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tle, or rather, when he admitted himself that he had no title to any part of the premises. The plaintiff admits that he has no paper title to the lot in question, or to any land in the town of Rutland, or to any undivided share of any land in the town, and that he has never been in possession of the lot in question, but insists that he has acquired a title simply by a *division* of lands in the town in which he had no previous interest. This is a mode of acquiring a title to property, as new as it is convenient. The gentleman, I presume, would extend his new discover'd principle to personal property also. I hope he may not extend it to mine, but he may on his principle—finding ten bushels of wheat in my bin, *divide*, and take five of it, and so make a division *in fact*, as in the present case. I call on him for the wheat.—He has none of my wheat—he has a clear and indisputable title to it—How came the wheat yours? you took it out of my bin.—I did which I can prove, and I can also prove that I made a *division of it, a just and equal one too;* for I took in the division one equal moiety of it—took five bushels and left five, and this in law gives me a title. We are wholly unable to discover any other principle on which the plaintiffs are entitled to recover in the present action.

Skinner Ch. J. delivered the opinion of the Court. The material facts in the case allowed by the Judge are, that by the records of the proprietors and a plan of the allotment, it appeared a division of the town of Rutland was made into severalty in the year 1793. This division was not made conformably to the statute, but is proved to have been ever since acquiesced in by the proprietors. The lands in the town are still holden under this division; and most of the lots were voted to the proprietors in lieu of their drafts. The record shows, that at a meeting of the proprietors in that year, they voted to James Mead, under whom the defendant claims, 80 acres upon the right of John Melvin on the 3d division; and also to John Smith, under whom the plaintiffs claim, adjoining thereto, 60 acres, that is, 20 acres to each of the rights of John Dandly, Thomas Blanchard, and Oliver Colburn, on the 3d division. This action is brought for the 60 acres. No right is claimed by either party to the land in question through any conveyance from the original proprietor. The deed from Mead describes the 80 acres as bounded north by the lot of Smith; and the defendant claimed the

land in question as part of the 80 acre lot. The Court directed a verdict for the defendant, the plaintiffs having failed to show a title by deed from the original proprietor, or by the statute of limitations, or by a prior occupancy.

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The language of the Court is a correct exposition of the law as to what is required of the plaintiff in ordinary cases to entitle him to recover in ejectment. But in this case it is insisted by the plaintiffs' counsel, that from the facts shown in evidence the defendant is concluded by the division, and is estopped from denying the plaintiffs' title. In recurring to the facts contained in the case, from which it may be supposed the plaintiff is concluded, the first inquiry is, as to the effect of the record of the proprietors on his rights. The object to be effected by a division, whether made conformably to the statute or not, is to sever that which was before in common. An actual division and allotment, made and approved by persons who are *not* proprietors, can have no effect upon the rights of those who are. If a majority of those who are proprietors should make, approve of, and acquiesce in such division, it can, at most, have no other effect upon the rights of the minority, than to sever and locate their rights. If the proprietors had the power to sanction a division, which was not made according to the requisitions of the statute, they had no authority to decide a question of title; they could not divest a proprietor of his right, or give a title that did not before exist. There is nothing in the law that authorizes the proprietors to decide a question of title; it may therefore be likened to a proceeding *coram non judice*, by which no one is estopped. The records of the acts of the proprietors cannot, therefore, estop the defendant, unless they are to be considered his own acts, or the acts of some one under whom he claims; and for this purpose it must at least appear, that he, as a proprietor, or those under whom he claims, personally aided in, and approved of the proceedings, or have recognized those proceedings by some act since, exclusively applicable to that which involved the *title* of the proprietors. If the proprietors are empowered to divide into severalty, and not to decide the question of title, that which furnishes evidence of an acquiescence, if it can consistently be confined to such acts as may by the proprietors be legitimately performed, can never be construed to extend to such as may not. It appears from the case, that this di

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vision of the proprietors has ever been acquiesced in, and the lands in the town are still holden under it; but it does not appear that John Smith was a proprietor. As no right is claimed by possession, the effect of this acquiescence, &c. must be confined to the severance, and the extent of all that could be claimed would be applicable to a case, in which a proprietor had accepted and taken possession of a lot, voted to him in lieu of his draft. The case shows the defendant claims title to the 80 acre lot by deed from the person to whom it was voted at the same time the 60 acre lot was set to Smith. If it is conceded, that, by deed poll and taking possession, the grantee can in any case be estopped, it is not perceived how the taking of the deed, and the claim under it, by the defendant, of the 80 acres, will estop him from denying the plaintiffs' right to the 60 acres or any other land. The defendant showed no other evidence of title than the deed of Mead; and none need have been shown as against the plaintiffs. It does not appear, whether Mead was, or was not the owner of the original right of Melvin; nor does it appear that the defendant claimed title by force of the vote of the proprietors. The extent of all that can be inferred from the case stated is, that he recognized the division & allotment. There is no reference in the deed to any records or proceedings of the proprietors; nor any recital of any right of Smith, by which the defendant is estopped, unless the reference in describing the boundaries should have that effect. But this surely cannot; it is but a supposal, and is generally immaterial even between the parties to the deed. Suppose there is a mistake as to the title of the person described as proprietor of the adjoining lot; there can be no authority or reason shown, wherefore the parties to this deed, or either of them, should be estopped from questioning the title of the person named, or should be prevented from holding such adjoining lot, by purchase thereafter from the real owner, against the person named as owner.

Therefore the Court consider in this case, that nothing short of evidence of title in the plaintiffs from the original proprietors, of fifteen years' peaceable possession, or of a prior actual possession (the defendant being a stranger, having shown no colour of right) could have availed the plaintiffs; but they having failed of showing either, judgment must be rendered on the verdict.

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H. executed his note of the following tenor:

"*Arlington, September* 27, 1808.

"For value received I promise to pay Luther Stone, Town Treasurer, or his successors in office, eighty-four dollars twenty-seven cents."—Held that the town of Arlington could maintain an action on the note against H.

THIS was an action of *assumpsit* on a note of hand. Plea, the general issue, which was joined to the Court, by agreement of parties. The evidence given by the plaintiff on the trial, was not objected to by the counsel for the defendant, it having been agreed that the same objections to the evidence might be urged upon the argument, as would have been proper upon the trial. The note declared upon was read in evidence, of the following tenor:—"Arlington, September 27, 1808. For value received I promise to pay Luther Stone, Town Treasurer, or his successors in office, eighty-four dollars twenty-seven cents."

Luther Stone was produced as a witness on the part of the plaintiff, who testified, that Hinds signed the note, and that he lived in Arlington at that time.—That the tenor of the note was the same as had been usually given under the direction of the Selectmen and Trustees of Schools for monies due the town.—That the note was given for rents due the town of Arlington upon school lands occupied by J. Austin.—That Austin resided in Arlington at the time the note was given, and for two years before.—That Hinds wrote and signed the note and Austin witnessed it, and that Austin now resides in the State of New-York. It was shown by the records of the town of Arlington that Luther Stone was Town Treasurer from the year 1789 for thirty-two years in succession.

Smith for the plaintiff. An agent having no interest in the performance of a contract, cannot support an action on such contract in his own name, but the action must be in the name of the principal. 1 Chit. Pl. 5, 24. 3 Bos. & Pul. 147, Piggot *v.* Thompson. 13 John. 38. 15 John. 1, Rathbone *v.* Budling. 13 John. 60, Randall *v.* Van Vechten. 10 Mass. 360. 5 Mass. 491, Gilmore *v.* Pope. 9 Mass. 335, Mann *v.* Chandler. 2 Con. 680, Hovey *v.* McGill. 1 Cranch 345, Hodgson *v.* Dexter. Bray. 230, Hinds *v.* Stone.

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The note was made and bears date at Arlington; the maker must, therefore, have intended the Town Treasurer of that town. 2 Bl. Com. 379.

In construing a contract, the Court may look at the situation of the parties. Pow. on Con. 376, 385. Chit. Ev. 417. 3 Coke 79 B. (n. 44.) 1 Cranch 345. 3 Mass. 77.

Corporations in their contracts may have a name different from that of their incorporation; and the identity of a corporation thus acting under a different name, may be shewn by parol testimony. 1 Bac. 501—2—3. 1 Com. Law Rep. 455, Croyden Hospital *v.* Farley. 7 Mass. 441, Minott *v.* Curtis. 10 Mass. 360.

A Town Treasurer has authority as such to take notes for debts due to the town, and especially where he has been permitted so to do, for a long course of time. 1 Stat. 408. 2 Con. 252, Buckley *v.* Derby Fishing Company.

Every person is supposed to assent to that which is for his benefit, and therefore the assent of the town to the note in question may be presumed. Pow. on Con. 138—9. 3 East 274. 4 Day 159, 349.

That there may be an implied assent on the part of a corporation is well settled. 7 Cranch 299, Bank of Columbia *v.* Patterson's administrators. 12 John. 227, Danforth *v.* Schoharie and Duane's Turn. Co. 14 John. 118, Dun *v.* St. Andrews Church.

The note in question is payable to a known officer of the town; it is, therefore, of no consequence, who took the note or how taken.

A contract may be declared on according to its legal effect; therefore, the note in this case is declared on and the suit properly bro't in the name of the town. 1 Chit. 299, 302. 1 Sel. N. P. 117. Cowp. 437, Martin *v.* Hind. 1 Chit. on Bills, 530 note 1—532 note 10.

Thus we have shown, that the note, in point of fact was given for a debt due to the plaintiff, the town of Arlington, and that it was made payable to the Town Treasurer of Arlington, and that in point of law the present action on the note is properly brought in the name of the town, and that consequently the plaintiff is entitled to a judgment.

Bennet for the defendant. It is contended that the town of Ar-

lington is not entitled to recover on the note in question. It is not apparent from the face of the note that the consideration moved from the town of Arlington, and no parol evidence is admissible to prove that fact. 11 Mass. 27, 54. 2 Cranch 308. It does not aid the plaintiff on this point that the note purports to have been executed at Arlington. The place where made is transitory, and the place where dated is immaterial. It is no part of the contract; one place may be alleged and another proved, and it is no variance. Laws Pl. 248. How then can the fact, where dated, be drawn in to affect the legal operation of the note? For aught that appears from the note, Luther Stone might as probably have been Town Treasurer of any other town. No inference is to be drawn from the fact where dated; much less from the residence of the parties. If a note had been given at Arlington to Joseph Burr, Town Treasurer, when in fact Town Treasurer of the town of Manchester, could this prove him entitled to the note as Town Treasurer of the town of Arlington, or vest the interest of the note in that town?

Again, if in fact it appeared by the note or by parol, that the consideration moved from the town, it could not give the town the action. The rule is, that the legal interest in bonds, bills of exchange, and promissory notes, resides in the person to whom their contents are made payable, without reference to the person from whom the consideration moves. Ham. P. A. 11, 33, 313—14. 10 Modern 286. 2 Cranch 302, 308.

In the present case, the note being made payable to Luther Stone, Town Treasurer, or his successors, the action should have been brought by Stone. The addition of Town Treasurer is mere *descriptio personæ*. 6 East 110. 8 Mass. 103. 9 John. 335. 1 Wash. 199.

Stone can only be regarded in the light of a Trustee of the town; and had the trust appeared on the note, by its being made payable to Luther Stone and for the use of the town, Stone alone could have the action. Carthu 5. 2 Str. 555. 4 Mass. 263.

If the legal interest in this note is in Luther Stone, he alone can bring the action. The right of bringing the action cannot reside in Stone and the town at one and the same time. The one or the other has the whole legal interest. The case is not analogous to the cases in the books, where principal or agent may sue at their option.

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Besides, bills and notes form an exception; the person appearing on them, as interested, must sue although only an agent. Ham. P. A. 316.

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As stated by the plaintiff's counsel, as a general rule, it is admitted, that a mere agent cannot in his own name support an action on a contract made by him as agent. The legal interest in such contract is in the principal, from whom the consideration moves. The consideration draws with it the legal interest. But this rule only extends to simple agreements—to such cases only where it is necessary in the declaration to set out the consideration, and prove it as alleged. Bills of exchange, promissory notes, bonds, &c. import *per se* a consideration—none need be alleged or proved. Hence, in such cases, the legal interest is in such persons as appear on the face of the instrument to have the interest.

Upon the question whether the note was attetsed by a witness, it appears that Jeremiah Austin the pretended witness, was at the time of the attestation an inhabitant of the town of Arlington, and that the note in qucstion was given for a debt due from Austin to the town. If the witness was at the time incompetent, it is as if there had been no witness, and no matter *ex post facto* can render the attestation operative. Austin was incompent upon two grounds:

1st. Upon the ground that he was an inhabitant of the town at the time of the attestation, a member of the corporation now suing: as such he had a common interest in all debts due the corporation, and especially in the school funds for which this note was given.

2dly. Upon the ground that this note was given for a debt due from Austin to the town, and so interested to have this note collected of Hinds; for should the note prove unproductive it would revive the debt in favour of the town against him. There is no pretence that there was an agreement that the note of Hinds should be received as payment, and the town run the risque of collecting it. To have discharged Austin, there must have been such express agreement. 7 T. R. 64. 5 John. 68. Though Austin might in that event have a claim against Hinds, the note having been given by Hinds in consequence of his being indebted to Austin, yet that would not balance Austin's interest. If a witness, by the event of a suit, may be laid under a legal obligation to pay a sum of money, though he may have a right to recover back the same sum from a

third person he cannot testify, his interest is not balanced—this is the case of bail for the prosecution of a suit. 2 Day 399.

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SKINNER, Ch. J. delivered the opinion of the Court. The plaintiff's right to recover is resisted on the ground that the town is not a party to the contract, and cannot maintain the action; and also, that the statute of limitations constitutes a bar.

We learn from the records of this Court, that an action has been heretofore brought upon the note here given in evidence by Luther Stone, as Treasurer of the town of Arlington, in which judgment was rendered for the defendant, upon the principle that no right of action thereon accrued to him in his official character. It also appears by the records that after that decision, Luther Stone, in his private capacity, instituted a suit upon the same note, in which he failed on the ground that from the face of the note it appeared that he was not the party in interest. The counsel for the defendant now contends, that the last decision, which was in his favour, was incorrect, and not warranted by authority. If it were proper to question this decision in a case where the same point was presented, it cannot be necessary here; for it does not follow of course, that, because an action may be sustained by one, all others are precluded. There are many cases of principal and agent, bailor and bailee, &c. in which the right is in either.

The question is, can the action be sustained by the present plaintiff? Whether he, for whose benefit a contract is made by another, shall be entitled to recover on it or not, is a question which has long been agitated in the Courts. In some of the cases, where it has been held the action cannot be maintained, the reason assigned is, that the *promise* is made to another; but in most of the cases it is, because he is a stranger to the *consideration*. On examining the cases it will be found to have been decided, that where the promise is made to him from whom the consideration moves, for the benefit of another, the action cannot be sustained by the latter. There are also authorities of great weight, that maintain the right of the latter to sue upon such contract. Many of the authorities show, that an action can be maintained by the former; and some, that the action may be sustained by either. There are cases, in which it has been decided the former cannot sue.—Cases also are to be found, in which the promise is made direct to the latter, and still he is not

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permitted to bring the action. The fair conclusion from all the cases is not, that the right to maintain the action, by him from whom the consideration moved, is not supported by the current of authority; but the right to maintain the action by him, for whose benefit the contract is made, the consideration moving from another, may be considered doubtful, especially where the promise is not made direct to him. The principle seems to be, that as a consideration is necessary to the validity of all simple contracts, it becomes material, in deciding to whom the right of action belongs, to inquire from whom the consideration proceeded. Str. 592. 11 Mod. 241. Cro. E. 380. Hard. 321. Keb. 44, 64, 122. Cowp. 437. As we view this case, the question whether the action shall be sustained by the person only from whom the consideration moves, or by the person for whose benefit the promise is made, is of no importance; for, whichever way that question be decided, it will be equally favourable to the plaintiff's right to recover—the consideration having proceeded from, and the promise made for the benefit of the Plaintiff.*

It is said that the consideration here is out of sight, and that it cannot be inquired into. This position is hardly warranted by authority. We have no law subjecting notes to the rules of the law merchant. By statute in England, and in some of the United States, promissory notes are placed upon the footing of bills of exchange, which import a consideration. They are here considered as they were in England before the Statute of Ann, simple contracts, and are subject to all the rules of the common law applicable to such contracts; their consideration may be inquired into, though the burden of proof is on the defendant, that is, he must show the want of consideration if the note express value received.† To inquire from whom the consideration moved is not strictly to impeach it. In this Court, when an action was pending upon this very note, brought by Luther Stone, it was decided, that he was a stranger to the consideration, evidenced from the *face* of the note, and that he was not entitled to recover.

This has been very properly considered, by the counsel for the plaintiff, as the case of a contract with an *agent*. To oppose this

* See the case Whitelaw Treasurer *v.* Cahoon.—ante 295.

† See the case Brooks *v.* Page.—ante 340, 344.

it is said that the contract is a perfect one on the face of it, and cannot be enlarged or diminished; that it does not appear from the note, that the consideration moved from the town of Arlington; that the legal interest of specialties, bills of exchange and promissory notes, is in the person appearing on the face of them.

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Town of Arlington *vs.* Hinds.

The principle contended for as to deeds and merchantile instruments is just. That this note is not of that description has already been attempted to be shown. If the position were correct, that no written contract, which upon the face of it is perfect, and in which nothing is expressed from which it may be inferred that any other than those whose names appear therein are interested, in other words, the name of the principal is concealed, can be enlarged, &c. it cannot be applied here; for no one can entertain a doubt, on reading this instrument, that Luther Stone has no interest in the contract, that he acted as agent for the town, and that the interest was in the town. The promise is to pay "Luther Stone, *Town Treasurer, or his successors in office.*" It would be unnatural and strange indeed, that Luther Stone from his private effects should be making provision, in case of his death or removal from office, for his successor. The case then is one in which the principal is not concealed, or rather the agency is manifested; and in such case, the principle insisted on by the plaintiff's counsel, that the agent cannot sue, is fairly drawn from the cases cited of Pigott *v.* Thompson, 3 Bos. & Pul. 147, Bowen *v.* Morris, 2 Taunt 374, and several others. Where a contract is made with an agent and the principal named, no one ever doubted the right of the latter to maintain the action. But it is said, that although it does appear that Luther Stone was not personally interested, but was acting as agent, yet it does not appear from the note who was his principal, that is, of what particular town he was Treasurer; and that this cannot be supplied by parol testimony. Assuming then that Luther Stone was agent—that the interest in the contract is the interest of his principal, and for which he might sue if named, the correct reading of the note is this: "I Adin Hinds, in the town of Arlington, this 27th day of April, 1808, promise for value received to pay the town eighty-four dollars twenty-seven cents." The fair and legal inference must be, that the town named in the instrument as the place where the contract is made, is the town to whom the promise is

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made. But, if this is uncertain, the ambiguity, we consider, may be explained by testimony *aliunde*.

The defendant further relies upon the statute of limitations. The statute provides, that actions upon promissory notes attested by one or more witnesses, shall be commenced within fourteen years, &c. on notes unattested within six years. It is true, this note was executed before the passing of the act, authorizing citizens of towns to testify in cases in which the town may be interested; and is attested by J. Austin, who then resided in Arlington. But, as there is no proof that he was a rated inhabitant, or had any interest, unless it arose from bare residence, the question as to the effect of the attestation of an interested witness does not require examination.

Judgment must therefore be for the plaintiff.

HUNTINGTON *vs.* HENRY LYMAN and Company.

Where a party seeking to charge a partnership is apprised that the transaction is not for their benefit, and the act is not in the usual course of business, *prima facie* the firm is not holden.

It is not necessary, to secure a person giving credit to a partnership, that he should know, or believe that each individual member of the firm would approve of the transaction; but it is necessary that he should *not* know that the debt attempted to be secured was not the debt of the partnership, or the property sold, was *not* to inure to their benefit, in the absence of all proof of the assent or approbation of the party attempted to be charged.

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THIS was an action of *assumpsit* on a promissory note for the sum of one hundred and ten dollars, bearing date the 19th of February, 1820, and signed Henry Lyman and Co.

On trial upon the general issue, at the last February term, the defendants admitted the execution of the note by Henry Lyman, and the existence of a partnership between the defendants at the time the note was executed, but resisted a recovery on the ground that the note was given for the purchase of a horse, that the articles of partnership did not extend to the purchase and sale of horses; and also that the plaintiff knew at the time that the horse was not purchased for the benefit of the company.

On the part of the defendant, articles of partnership were produ-

ced, executed by Henry Lyman and John Boardman, and bearing date the 20th March, 1813, by which it was agreed, "that the said partners enter into copartnership in the mercantile business in Shaftsbury, and that the said Henry Lyman should attend to and transact the business of the said concern in all its various branches, with the advice of the said John Boardman."

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It appeared by an agreement in writing, on the back of said articles of partnership, signed by the said Henry Lyman and Clarissa Boardman, bearing date the 20th day of March, 1814, that said partnership having been dissolved by the death of the said John Boardman, they the said Henry Lyman and Clarissa Boardman agreed that the business should be continued in the name of Henry Lyman & Co. for their joint benefit.

Daniel Huling, on the part of the defendants, testified that he heard the plaintiff say, that he had sold a horse to Henry Lyman, and had taken Henry Lyman & Co's note for it, for one hundred and ten dollars, and that after the death of John Boardman, Mrs. Boardman continued the business, at the same store in place of her husband.

The defendants then read in evidence the deposition of Horace Barlow, who testified, that some time in the winter or spring of 1820, thought it was in the month of February, he was knowing to Daniel Huntington's selling a horse to Cornelius Clarke, or Cornelius Clarke and Henry Lyman, for the purpose, as he understood, of matching a horse which Clarke at that time owned. And it was, at the time of the sale, talked over between Huntington and Clarke, that they wanted to purchase the horse to match one which Clarke then had. The price of the horse, he thought was one hundred and ten dollars; and a note was written for the same, either payable to Daniel Huntington, and signed by said Clarke and Lyman, or drawn payable to said Huntington, and signed by said Clarke, and indorsed by Lyman. This note Doctor Huntington seemed unwilling to take, and assigned as a reason, that he did not want Clarke's name on it, but wished a new note drawn, and signed by Lyman, in the name of the company of Henry Lyman & Co. and it was accordingly done, and the first note destroyed. The horse that was purchased was received by Clarke, & by him kept for three or four months, and then, as he understood, was sold in the State of New-York.

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On being questioned, he further testified that he lived with Henry Lyman at the time the horse was purchased.—That the horse was never in his keeping, and understood at the time that the horse was purchased to match one which Clarke had.—That he presumed Mrs. Lyman had no knowledge of the purchase of the horse.—That he had been a clerk in the store about four years.—That Mrs. Lyman intrusted the business wholly with Lyman, and had no means of knowing any thing of the affairs of the store, except from a general inventory of all debts due to, and owing by the store, made by Lyman; she was in the habit of coming to Shaftsbury once a year, when she examined this inventory.

Daniel Huling, called by the plaintiff, testified that he had no knowledge of the avails of the horse for which the note in question was given, having gone for the benefit of the company; but that Lyman went to Albany with the horse and his mate, with Clarke, and came back with a grey span. He knew that Lyman was in the habit of purchasing horses for two or three years, and taking them to Troy, Albany and Hartford to sell.

Gershom Waldo, a witness on the part of the plaintiff, testified that he knew of Lyman's buying horses to raise money to pay debts. And, at one time, while at Mrs. Boardman's in Troy, was asked by her if he knew how Lyman got along with business; and inquired if he knew whether Lyman had got a horse for her, and said that Lyman had already got a horse for her use, which did not suit, and as he was trading a good deal in horses, he was to take this one back and get her another. Mrs. Boardman said she was afraid Lyman was trading in horses too much for their benefit: The witness said he knew of Lyman's purchasing many horses, and that Mrs. Boardman came out to Shaftsbury about once a year and stayed two or three days or a week.

Ezra Olin, on the part of the plaintiff, testified that he knew Lyman had been in the habit of purchasing horses for three or four of the last years of his deal; had seen Lyman sell horses for money, and had known him to take horses to Troy, Albany and Hartford to sell. At one time Mrs. Boardman told him, the witness, that Lyman had purchased a horse for her that did not suit her, and she wished Lyman to take the horse back, and get her one that would suit, as he was in the habit of purchasing horses. Mrs. Boardman,

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while at Shaftsbury in the spring of the year 1818 or 1819, told him, the witness, that she had taken an inventory of the cattle, horses, lumber and goods. And, on being cross-examined, the witness said, that at the time alluded to, he came into the store, and seeing the goods down on the counter, he inquired what that meant: and Mrs. Boardman answered, that they were in the habit of taking an inventory of the goods every year, which they were then doing, and that this was all she said. The witness further said that he once saw the horse in Lyman's stable; and that the plaintiff had lived within one half mile of the store ever since it was opened.

Gardner Bates, on the part of the plaintiff, testified that in the summer, about four months before Lyman failed, he, the witness, sold a horse to Lyman for eighty-five dollars, and took a company note for it, which he transferred, and it came back into his hands. He afterwards called on William Boardman, who after some hesitation paid it. He told William Boardman that the note was given for a horse.

Jonathan Slocum, on the part of the plaintiff, testified that he sold a horse to Lyman for eighty dollars, and took a company note for it payable the first of April after Mrs. Boardman took the books.—That he, the witness, transferred this note to John H. Olin, jr. January before it fell due, he settled with William C. Boardman the accounts of the firm, and told him that he had got the aforesaid note. When the note fell due, he understood that William C. Boardman paid it; but also learnt that John H. Olin threatened him with a suit if he did not pay it, and that he would attach the goods in the store. I told said William C. Boardman that said note was given for a horse, and he afterwards told me that he had paid it.

Moses Fay, on the part of the plaintiff, testified that he sold Lyman a horse for eighty dollars—that Lyman paid him some money towards it.—That he had at different times sold Lyman three or four other horses, and took his pay, sometimes out of the store, and sometimes in money and notes against others, in favour of the company.—That Lyman had a family, and carried on considerable farming business.—That he, the witness, had taken two or three horses to market for Lyman and brought back the money to him.

Benjamin Brown, on the part of the plaintiff, testified that in No-

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vember, 1819, he sold a horse to Lyman, and took a note against the company payable in one year, and William C. Boardman paid the note; he, Boardman, knew that the note was given for a horse, and Lyman told him that it was sold for the benefit of the store.

W. J. on the part of the plaintiff, tistified that he sold Lyman two horses in payment of a debt due from him to the company, and which were credited on the company book.—That he sold Lyman another horse for which he paid him the money.

Nathan Burton, on the part of the defendants, testified that he was one of the Judges who tried the cause in the Court below, but did not recollect that Waldo testified that Mrs. Boardman said that Lyman was trading too much in horses for their benefit.

William C. Boardman, on the part of the defendants, testified that on the 20th of October, 1820, an inventory was taken by witness and Henry Lyman, preparatory to a dissolution of the partnership, of all the company property at Shaftsbury; which comprehended goods in the store, lumber, cattle, and two or three horses. And some articles were inventoried which the witness believed to be the individual property of Henry Lyman.—That on the 23d of December, 1820, the whole property of the company was transferred by Lyman to the witness' mother, Clarinda Boardman, she undertaking to pay all the debts against the company; and he, the witness, was made agent for closing the concern.—That on the 16th of January, 1822, a dissolution of the copartnership took place; and about the first of February following, Lyman ran away.—Shortly after Lyman ran away, Gardner Bates demanded payment of a note he held against the company, and threatened an immediate suit on it if it was not paid, upon which he, witness, paid the note.—That at the time he paid the note to Mr. Brown, he supposed he was bound to pay all the notes that had the company name upon them; but he was afterwards directed by Mr. Russel of Troy, and then by his mother, to pay no debts that were not contracted within the limits of the company concern.—That the above note was paid under a misapprehension of the obligation of the company, and without any knowledge or direction of his mother. The witness says that he has no recollection that at the time he paid the above notes he knew they were given for horses.—That the note in favour of Jonathan Slocom, and paid to John H. Olin, was paid

without the witness knowing for what it was given; and when he, the witness, afterwards learnt that it was given for a horse, he expressed his regret that he had paid it.

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Henry Lyman, at the dissolution of the partnership, claimed as his individual property a saddle and bridle, and he thinks one of the horses. His mother used to make a visit to Shaftsbury about once a year, and usually stayed there two or three days.

Freeborn Mattison, on the part of the defendants, testified that Cornelius Clarke had the horse in question the whole of the next winter after he was purchased; and that previous to the purchase Clarke had a bay horse for which he wanted a match, and inquired of the witness if he knew of a match for him: witness recommended the horse in question, and he afterwards saw Clarke with the horse, but never saw the horse in Lyman's possession.

David Mattison 2d, on the part of the plaintiff, testified that three or four years ago he was driving the horse in question with his mate from Troy in company with Clarke.—Three or four miles this side of Troy they met Lyman, who stopped them, and said the horses should never go back again into Vermont, and took them and with Clarke went towards Troy, and he never saw the horses afterwards.

Upon this evidence the Court were of opinion that the plaintiff was entitled to recover, and under their direction the Jury found a verdict for the plaintiff.—To which opinion of the Court the counsel for the defendants excepted, and filed a motion for a new trial, upon which the cause came on to be heard at the present term.

Bennet for the defendants. It will be contended on the part of the defendants that they are entitled to a new trial on the following grounds:

1. The note in question was executed by Henry Lyman, in the name of the company for property, known at the time to the vendor to be without the scope of the partnership concern, as originally established; and, of course, not obligatory upon the firm.

2. From the whole case, no act appears to have been done by Mrs. Boardman to extend the partnership to the purchase of horses, on a credit, from which her assent to the giving of the note in question can be presumed.

To bind Mrs. Boardman to the payment of this note, she must

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have assented to it at the time of its execution; though this assent might be proved by *previous*, *concomitant*, or inferred from *subsequent* acts: such subsequent acts as always furnish evidence of the assent accompanying the contract.

3. We shall not take up the time of the Court with an examination of the evidence relative to an extension of the partnership; for admitting all that the plaintiff contends for, that the partnership was extended to the purchase and sale of horses, yet it is very clear that the defendants are entitled to a new trial. The law is well settled, that if a person take of one partner the partnership security for property, which he knows at the time, is for the individual use of that partner, though within the scope of the partnership business, the firm are not bound: it is a fraud upon the other partners. Swift. Dig. 342. 4 John. Rep. 271. 2 Esp. Rep. 523. 2 Caine's Rep. 246.

Much less would the firm be bound where the property was for the use of a *third* person.

In the case at bar, it appears from the statement of the evidence, that it was proved on trial to the Jury, that the horse was purchased for the use of one Clarke, and this known to the vendor at the time of the sale. These facts, if believed, constituted a most ample defence, and it was the peculiar province of the Jury to weigh the evidence.

D. Robinson and *Merril* for the plaintiff. A partnership between country merchants, for carrying on trade, is not a limited or special partnership: it extends to all kinds of personal chattels. Swift. Dig. 339. And if a note be given in the name of the firm for an article, which is or may be necessary for transacting its concerns, all the partners are holden. 4 John. 251.

In this case no notice was ever given to the world of the nature and extent of the partnership; of course, all persons dealing with Lyman, the acting partner, could judge of the extent of the partnership only by the extent of his deal. And, from the evidence in the case, it appears, not only that Lyman dealt in horses—that he continually purchased and sold on the partnership account, but that Mrs. Boardman had a perfect knowledge of it.

But it is said in this case, that, if the partnership did extend to the purchase and sale of horses, yet the horse in question was not

purchased for the benefit of the company, but for the use of Clarke, a third person; and that this was known to the plaintiff at the time: and, therefore, it is said, that the company cannot be liable.

We are not disposed to controvert the principle, that if a person take the partnership paper, knowing it not to be on partnership account, the partnership are not liable; but this is always considered a question of fraud. 7 East. 210. 13 East. 175, Ridley et al. *v.* Taylor. 4 John. Livingston *v.* Rosevelt. 11 John. 554, Doty *v.* Bates et al. Chit. on Bills 45. 1 Camp. 185. And the fraud in such case must be clearly proved, in order to exonerate the company. But the evidence in this case does not even prove the fact that the horse was not purchased for the benefit of the company. That the horse was purchased for the use of Clarke. and that Clarke received the horse at the time of the purchase, does not prove this fact; for the horse might have been sold to Clarke at the time of the purchase, on account of the company, but it cannot be in the power of the plaintiff to show this; he has none of the books and papers of the company by which to show it: But it must have been in the power of the defendants to have shown that the horse was not purchased and sold on the company account. The company books and papers are not exhibited, nor does William C. Boardman, who settled the accounts of the company concerns, and held the books and papers, say one syllable respecting the deal between Clarke and the company. It must then, we insist, be taken that the facts in relation to the deal between Clarke and the company, could not be safely disclosed by the defendants. At any rate there is no proof that the purchase and sale of the horse were not on the company account: And the plaintiff having shewn that the purchase and sale of the horse were within the general scope of the partnership deal, and the defendants having failed of shewing that this particular purchase was not made for the benefit nor intended for the benefit of the company, the company must on every principle be bound to pay the note.

Skinner, Ch. J. delivered the opinion of the Court. This action is founded upon a note of hand, executed in the name of Henry Lyman & Co. to Daniel Huntington the plaintiff. The firm of Henry Lyman & Co. consisted of Henry Lyman of Shaftsbury, and Clarinda Boardman of Troy. The consideration of the note

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was a horse sold by Huntington. At the trial the counsel for the defendants, or rather for Mrs. Boardman, resisted a recovery on the ground that the partnership was for such mercantile purposes as usually appertain to a country store, and did not extend to the purchase and sale of horses; and also, that the plaintiff at the time of taking the note, knew the debt was not the debt of the partnership, but the purchase of the horse was by Cornelius Clarke, a third person, and for his benefit, or for that of himself and Lyman. To oppose the first part of the defence, the plaintiff relied on proving that the partnership had been extended, by the transactions of the partners, to the purchase and sale of horses upon credit, and thereby he was authorized to take the note. And from the case as allowed it would seem, that the attention of the Court was wholly drawn to the testimony upon this point, and that the other ground was overlooked in directing a verdict for the plaintiff. Whether the testimony was sufficient to justify the Court in directing a verdict upon the question of the extension of the partnership is not necessary now to examine. In deciding upon this application for a new trial, the attention of the Court has been directed to the inquiry, Is the plaintiff entitled to recover, if he knew at the time of taking the note, that the contract was not for the benefit of the partnership? Was there evidence given to the Jury tending to prove this, and which they ought to have weighed?

In the case of Arden *v.* Sharp and Gilson, although there was no proof direct, that the transaction was known to the plaintiff to be for the sole benefit of Gilson, one of the partners, Lord Kenyon says, "When the party, who brings the action, took the bill, with the indorsement of one partner only, (Gilson indorsed in the name of the firm) and was informed that the transaction was to be concealed from the other, he cannot sue the partnership; the transaction *indicates* that the money was for the partner's own use, and was not raised on the partnership account." The same Judge again says, in the case of Wells *v.* Masterman et al.—"If a man, who has dealings with one partner only, draws a bill on the partnership, on account of those dealings, he is guilty of a fraud; and in his hands the acceptance made by the partner is void." The doctrine here expressed is, a knowledge that the dealing is not for the firm, renders the security fraudulent and void. In the first case the circum-

stance of the partner's having requested the transaction *concealed*, without other evidence, was considered sufficient to establish both facts, that is, that it was not for the firm, and knowledge thereof in the party. In the case of Sheriff *v.* Wilks et al. the same principle is fully recognized by the whole Court, and in many other cases. The case of Ridley *v.* Taylor, which is much relied on by the counsel for the plaintiff, cannot be considered as opposed to this principle. Lord Ellenborough, in delivering the judgment in that case, says, "If this were distinctly the case of a pledging, by one partner, of the partnership security, for his own separate debt, without the authority of the other, we should have no hesitation in pronouncing a bill, drawn under such circumstances, void, &c."

The law we believe to be settled, that where the party seeking to charge the partnership is apprized that the transaction is not for or on account of the firm—that the credit is not for their benefit, and the act is not in the usual course of business, *prima facie* the firm is not holden. The *onus probandi* then falls upon the plaintiff. He must show the authority or approbation of the party attempted to be charged. 1 Sal. 126. 1 East. 49. 4 John. R. 251. 2 Esp. 525, 731. 8 Vez. 544. Liv. D. 342. The remaining inquiry is, was there testimony given to the Jury tending to prove Huntington's knowledge? And of this no doubt can be raised. If the testimony of Barlow is to be credited, and, of its credibility the Jury ought to have been permitted to decide, not only knowledge, but *covin* is fairly inferable from the whole transaction. The horse, he says, was purchased for Clarke, and to mate one that he owned, and this understood by Huntington at that time. The note of Clarke indorsed by Lyman, or of Clarke and Lyman jointly, was executed. Huntington wished a new note drawn and signed by Lyman in the name of the firm, which was done, and the first note destroyed. If the credit of Clarke, or Clarke and Lyman were good, it would have been relied upon; but if not, and the credit of Mrs. Boardman was demanded, there ought to have been evidence of her consent, express or implied. But, so far from this, the evidence not only shows that Huntington knew it was not a partnership concern, but on the contrary, from the execution of the first note by Clarke and Lyman, it was fairly to be inferred that neither the usual course of business, nor any assent of Mrs. Boardman, would warrant the

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attempt to charge her. From the facts the Jury might very naturally conclude, that Huntington was persuaded, that if Mrs. Boardman was charged, it must be effected without her knowledge or consent.—She resided at a distance from the store where the business of the partnership was transacted, and her capital constituted the means employed.

It is not necessary, to secure a person giving credit to a partnership, that he should know or believe that each individual of the firm would approve the transaction; but it is necessary that he should *not know* that the debt attempted to be secured was not the debt of the partnership, or the property sold was *not* to inure to their benefit, in the absence of all proof of the assent or approbation of the party attempted to be charged.

The verdict therefore must be set aside and a new trial granted.

MYERS *vs.* BROWNELL.

On the 3d of March, 1817, A executed a mortgage of his farm to B. to secure the payment of a debt due from A. to B. On the 15th of November, 1820, C a creditor of A. commenced an action against A. and attached the same farm. On the 3d of February, 1821, the debt due from A. to B. secured by said mortgage remaining unpaid, A. executed a warranty deed to B. of the same farm, in full satisfaction of said debt. In June, 1821, C. recovered judgment in his suit against A. prayed out execution, and extended the same on a part of the same farm.—Held that the execution of the warranty deed by A. to B. was not a performance of the condition of the mortgage, but operated as a release of the equity of redemption, and that the title of B. under the mortgage was not merged in his title under the warranty deed, but that B is to be considered as a prior, and C. as a subsequent mortgagee.

A person in the chain of title is a competent witness, if it appear that he has no interest in the event of the suit.

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THIS was an action of ejectment for eleven acres of land in Pownall, part of a farm of one hundred and sixty acres formerly owned by Samuel Cord. On trial upon the general issue at the last term, the plaintiff to maintain the issue on his part, gave in evidence a copy of a record of the County Court by which it appeared that on the 15th of November, 1820, said farm was attached at the suit of the plaintiff, Myers, against Cord.—That judgment was

rendered in favour of Myers against Card in that suit at June term, 1821.—That Myers prayed out execution on the judgment, and on the 3d of August, 1821, extended the same on the lands in question. The defendant, Brownell, then gave in evidence a mortgage deed of the whole farm, executed by Card to him on the 3d of March, 1817, conditioned that Card should pay three several notes of hand, executed by him and Brownell to other persons, for the security of debts due from said Card, amounting in the whole to $4350. The whole of the notes fell due within one year thereafter. And it appeared that Brownell had paid some part of the sum due on said notes; and he gave in evidence a record of the Court of Chancery, by which it appeared that at August term, 1821, Brownell obtained a decree of foreclosure by which Card was decreed to pay Brownell the sum of $4530 49, and the interest thereon, by the first day of August 1822, or be foreclosed.

The plaintiff then offered in evidence a copy of a deed of warranty from Card to Brownell of the whole farm, dated 3d of February, 1821, together with evidence tending to show that at the same time, Brownell having paid no part of said notes, it was agreed between Brownell and Card, in consideration of said conveyance, that Brownell should pay the amount of said notes; and that Card then agreed to indemnify Brownell against the encumbrance of the plaintiff's attachment, and that Brownell has since received of Card some portion of the amount of the plaintiff's demand in his suit against Card. All which evidence thus offered by the plaintiff was excluded.

The defendant then offered Card as a witness, his interest having been discharged. The plaintiff objected to the admission of Card as a witness, on the ground that he was in the chain of title, which objection was overruled by the Court, and he was admitted as a witness. The Jury returned a verdict for the defendant. The plaintiff filed exceptions to the opinion of the Court in excluding the evidence by him offered, and admitting Card as a witness on the part of the defendant, and filed a motion for a new trial, on which the cause came on to be heard at the present term.

Bennet for the plaintiff. We shall insist that a new trial ought to be granted on account of the rejection of the evidence on the part of the plaintiff, on the following grounds:

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1. The mortgage deed executed by Card to Brownell on the 3d of March, 1817, was given to indemnify Brownell from loss in consequence of his having become surety for Brownell to a large amount.

It is well settled law, that the person to be indemnified, to entitle him to maintain an action, must shew that he has sustained damage, in the payment of money, or in some thing to which the condition of indemnity extends. A bare liability to be damnified is not enough. Hence, until there was an actual damnification, there could be no breach of the condition of the mortgage. And, by the statute law of this State, a mortgagor has against the mortgagee the right of possession until there be a breach of the condition. The facts offered to be proved on the part of the plaintiff, showed that on the 3d day of February, 1821, (the date of the warranty deed) Brownell had not been damnified; and that at that time, as a consideration for that conveyance, he undertook to pay on his own account all the debts contained in the condition of the mortgage, and for which he was originally but a surety; and also indemnified himself by bond against Myers' attachment. From these facts it is clear that Brownell had at no time been damnified—could at no time maintain a personal action against Card, and hence, under the statute of this State, could not maintain an action of ejectment to recover possession of the mortgaged premises.

2. At law, as well as in Chancery, a mortgage is regarded as a mere accident to the debt, its principal. By assigning the debt the mortgage passes; by paying it the mortgage is satisfied. 2 Bur. 978. 7 John. 278. 11 John. 538. 1 John. 580.

In the present case, the implied undertaking on the part of Card to indemnify Brownell for becoming his surety was the principal to which the mortgage as an accident was attached. The evidence offered and rejected by the Court, entirely swept away this implied undertaking; so much so, that if Card had been afterwards compelled to pay the notes, he might well have sued Brownell for monies paid for his use.

The execution of the second deed was by the express contract of the parties, (without resorting to the principle of merger, founded upon a legal inference) a satisfaction of the mortgage. The original relation between Card and Brownell was changed. Card in

fact, as between them, after the second deed, stood as security for Brownell on the notes. How then can the mortgage be regarded as a subsisting title?—it must fall with that to which it was attached. "A weak foundation destroys the superstructure." This argument goes upon the ground that there had been a breach of the condition.

3. It is contended that the title of the mortgage was merged by the legal operation of the second deed.

As a general rule, where the legal and equitable titles are united, the equitable title no longer exists; it is merged in the legal title, and extinguished by the unity of seisin. 2 Bl. Com. 177. Coke Lit. 384.

Chancellor Kent, in the case James *v.* Morey, 7 John. R. 278 says, "The merger is only prevented in Chancery in special cases, where it was the evident intention of the parties, and where justice requires the encumbrance to be kept up." But why keep up the encumbrance in this case? Does justice require it? Did not Brownell himself treat the mortgage as extinguished? Did he not provide for the Myers claim? Does he not now hold in his hands nearly the whole amount of that debt?

The case of Goodlittle *v.* Pope, 7 T. R. 185, is conclusive on this point; for how could posterior equitable rights be let in to the prejudice of the mortgage, unless his mortgage was merged in the absolute conveyance, which Chancery might decree in pursuance of the agreement of 1792?

D. Robinson and *Sheldon* for the defendant. The plaintiff has taken two exceptions to the opinion of the Court, first that the evidence offered by the plaintiff was improperly excluded, and secondly that Card was improperly admitted on the part of the defendant.

In support of the first exception the counsel for the plaintiff contends that the defendant's title under the mortgage was merged in his title under the subsequent deed of warranty; but he has himself shown that the defendant's title under the warranty deed is merged in his title under the mortgage. He says that it is a general rule, that where the legal and equitable titles are united, the equitable title no longer exists; that it is merged in the legal title, and extinguished by the unity of seisin. Now apply this principle to the

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present case. The defendant had the legal title under the mortgage, and which had become absolute at law, as there had been a breach of the condition. Card had a mere equitable title only—a right in equity to redeem. 6 Mass. 52. 4 John. 221. This equitable title Card conveyed to the defendant, and being united with the defendant's prior legal title under the mortgage, was merged in it; and the defendant then had under the mortgage an absolute indefeasible title, which was before defeasible, subject to be defeated by a redemption. As Card had only this equitable title, an equity of redemption in the mortgaged premises, he could convey nothing more by any form of conveyance. And it is perfectly indifferent in what form he conveyed his title to the defendant, whether by a release of his equity of redemption in form, by a deed of warranty, quit-claim deed or other conveyance—the only legal effect is the same, to render the title of the defendant absolute and indefeasible, which was before defeasible, subject to be defeated in equity by a redemption of the mortgage, 2 Con. Rep. 161, Baldwin *v.* Norton. 8 John. 29. It follows that the evidence offered on the part of the plaintiff, and rejected by the Court, was perfectly irrelevant and prop erly excluded.

The counsel for the plaintiff, it seems, does not rely on his second exception—the admission of Card as a witness. That a grantor in a deed, when discharged from all liability arising from his deed, is a competent witness in support of the title derived from the deed has been often decided. Swift. Dig. 748. 5 Day, Clarke *v.* Johnson. Cro. Char. 102. 18 John. 60. 6 John. 135, Mapes *v.* Frost et al. 2 John. 394.

Skinner, Ch J. delivered the opinion of the Court. The plaintiff, Myers, claims in his declaration eleven acres and forty-three rods of land in Pownall, being part of a farm of one hundred and sixty acres, formerly owned by Samuel Card. The action was tried at the last term under the general issue. The plaintiff to maintain the issue on his part, showed in evidence copies of the record of the County Court, from which it appeared that on the 15th of November, 1820, the farm was attached at the suit of Myers against Card; judgment in that suit was rendered June term, 1821; and the lands in question appraised, and taken upon the execution, in satisfaction thereof, on the 3d of August, 1821. The defendant,

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Brownell, then showed in evidence a deed of the whole farm executed by Card to him on the 3d of March, 1817, conditioned, that if Card should pay three several notes of hand, executed by him and Brownell to other persons, amounting in the whole to $4350, according to the tenor of said notes, then the deed to be void. The notes all became due within one year. He further showed in evidence, that he had paid some part of the sums due on the notes; also the record of the Court of Chancery, August term, 1821, by which Card was decreed to pay Brownell the sum of $4530 49, and the interest thereon, by the 1st of August, 1822, or be foreclosed. The plaintiff then offered in evidence the copy of a deed of warranty, from Card to Brownell, dated the 3d of February, A. D. 1821, of the whole farm; together with evidence tending to show, that at that time, Brownell having paid no part of the notes, it was agreed between Brownell and Card, in consideration of the conveyance, Brownell should pay the amount of the notes; and also, that Card then indemnified Brownell against the encumbrance of the plaintiff's attachment, and that Brownell has since received a large portion of the money; all which evidence was excluded. The defendant offered Samuel Card as a witness—his interest having been discharged. The plaintiff objected to his testifying, and the objection was overruled. Verdict for the defendant. The plaintiff excepts to the opinion of the Court in rejecting the testimony by him offered; and in the admission of Card as a witness.

The defendant having shown a prior encumbrance to that of the plaintiff under the attachment, it becomes necessary for the plaintiff to show this right of the defendant extinguished or removed. The ground taken by the plaintiff's counsel, if rightly understood, as to the legal effect arising from the facts offered to be proved, is, that the interest of Brownell, acquired by the deed of 1817, was merged in the interest acquired by the deed of 1821; or that the execution of this deed, and the agreement of Brownell, in consideration thereof, to pay the demands referred to in the condition of the first, was in law a performance or satisfaction of the condition, or, in other words, a payment of the debt, (for the case, on principle, is not distinguishable from one in which the deed of mortgage is executed directly to the creditor). The lien of Myers, the attaching creditor, is to be regarded in the same point of view, as that of a second mortgagee; and in deciding the question, it is proper to consider

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what his rights were at the time of his making the attachment. If the deed of February 1821 had not been executed, Myers could not have had the benefit of his lien without paying off the incumbrance, and this is all he is now required to do; he cannot therefore in justice say, that he is prejudiced by being postponed. If he has the precedence, it has been cast upon him without any act of his, and without the aid of any of the effects of Card, by which his debt might have been satisfied. If payment by Card in property other than the lands mortgaged, had been made, there can be no doubt Myers would be prejudiced, if the same had not been applied to the encumbrance, and the law would have made the application. If the taking of the deed of February 1821 by Brownell is to have the effect of destroying his rights under the mortgage, he must be injured. The injustice of adopting the principle would be more strikingly exemplified, had the demand of Myers equalled in amount the value of the property; and without some authority to support the doctrine the Court cannot be justified in so deciding. No authority is shown to support the position, that the legal estate of the mortgagee is merged by the purchase of the equity of redemption by him; and no case can be found, in which the law will declare the union of two estates in the same person a merger to his prejudice.

Whether the legal inference from the evidence offered would have been that the condition of the mortgage was performed or satisfied, or the claim of the mortgagee under the deed thereby relinquished, must be decided from the manifest intention of the parties; for the law will raise no contrary presumption. It would seem that there could hardly be a contrariety of opinion as to the intention manifested by the facts offered to be proved, which in substance are these: Card has executed a deed of his farm to Brownell, with a condition of defeasance on the payment of certain notes of hand, executed by himself and Brownell as his surety, according to their tenor. Card fails to perform the condition, and proposes to discharge his rights under the defeasance, in consideration that Brownell relieve him from the payment of the demands.—Brownell complies; and Card discharges his equity of redemption in the most natural and ordinary way, by executing an absolute deed of the premises. In lieu then of performing the condition the pledge is surrendered.—This surely is not a release of the pledge by the person taking it; the condition is not performed, nor the debt paid.—That only is done, which the

parties originally agreed upon, that is, the estate should be absolute in Brownell, if the condition was not performed. The cases cited from Connecticut and Massachusetts support the decision made upon the trial, and we are apprized of no authority, that would justify the granting of a new trial on this ground.

The circumstance of Card's having given security to Brownell against the lien of Myers in no way subjects him to the payment of the debt, nor is it perceived how any inference arises therefrom, that Brownell considered it as interfering with his claim under the deed of February 1817. That he had an interest in having this lien removed, which was prior to his purchasing the equity of redemption, and would take precedence to his rights acquired thereby is apparent.

As to the other point, there is no rule of law that excludes a witness because he is in the chain of title. If he is thereby interested in the event of the suit, he is excluded on the ground of interest. If this interest is removed, he may testify. The case states Card's interest was discharged, but the manner in which it was done, does not appear; the Court, therefore, are obliged tó consider it as having been effectually and legally done, if by any possibility the case would admit of such procedure. That the grantee may release the covenants, so as to discharge any right which *he* may have, is clear; and if such release accompanies the deed on record, the Court consider, that if, as is insisted, his assignee, without this, would have a right to pursue the first grantor, this would destroy such right. It is not necessary, therefore, to decide whether Card's interest was equally balanced between the parties.

As no sufficient ground is shown in the opinion of the Court to set aside the verdict, judgment must be rendered thereon.

NOTE

To the Case PROCTOR *vs.* WEBBER, *referred to, ante page* 379.

THAT a Corporation cannot be bound except by its corporate seal, was a settled rule of the ancient common law; and, until modern times, no deviation from it—no relaxation of it is to be found in the English authorities.

I shall neither trouble myself nor the reader with an examination of the numerous authorities to be found in support of this rule.—Nor shall I stop to inquire particularly after the causes which operated to establish this rule, or the reasons on which it was founded. It may however be said, that it was established at a time when the property of Corporations, as well as the property of individuals, consisted almost wholly of real estate, in the management and disposition of which, by Corporations, the rule in question, if not useful and even necessary, was at least not inconvenient. It was established at a time too, when the rights of Corporations (at that time principally ecclesiastical) obtained a higher regard, and were more carefully protected than the rights of individuals. But when personal property increased, and Corporations, instead of holding a dead capital in real estate, were created for the purpose of uniting and more conveniently managing an active capital, we shall find, by adverting to a few modern English cases, that the rule has been relaxed in England; and by a collection of American cases, we shall find that this rule was first adhered to—afterwards gradually relaxed, and at length wholly set aside, and in its place the rule of law settled, that "Whenever a Corporation is acting within the scope of the legitimate purposes of the Corporation, all parol contracts, made by its authorized agents, are express promises of the Corporation. And all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie."

The following English cases will show that the ancient rule, as before remarked, has in modern times been relaxed in Great Britain:

In the case Rex *v.* Bigg, 2 Peer. Wms. 419, it was held that a Corporation might without seal authorize an agent to sign notes.

In the case Rex *v.* the Bank of England, Doug. 524, the Court refused to grant a *mandamus* to the Bank to transfer stock, because there was a remedy against the Bank by an action on the case, if they refused. And a special action on the case was afterwards brought against the Bank, and a verdict taken for the plaintiff, subject to the opinion of the Court. The suit was afterwards compromised by the parties, and so no decision of the whole Court in the case.

The same principle was recognized by the Court, in the case in Chancery, Bank of England *v.* Moffatt, 3 Brown's Ch. Cases 262. From these and other cases it appears that the ancient rule has been departed from by the Courts in Great Britain, but no definite rule seems to have been settled in its place.

By the following American cases it will be seen that the ancient rule of the common law was first adhered to, then gradually relaxed, and at length wholly set aside, and the rule above stated settled in its place, adapted to the situ-

ation of the country, and well calculated to secure alike the rights of all classes of the community.

In the case Breckbill *v.* Turnpike Company, 3 Dallas 496, it was decided by the Supreme Court of Pennsylvania, that an action of *indebitatus assumpsit* will not lie against a Corporation, as all their contracts must be under their corporate seal. In this case the question seems not to have been much investigated: the counsel for the defendants cited 1 Bl. Com. 475. 6 Vin. Abr. 268. 3 Salk. 103. 6 Vin. Abr. 292, 287. 8 Kyd. on Corporations, 449, 450, 259, 268. This case was decided in the year 1799.

The case William Gray, jr. *v.* the Portland Bank, 3 Mass. Rep. 364 was an action of *assumpsit*. The declaration contained three counts—the two first *indebitatus assumpsit*—the third a special *assumpsit*. The declaration originally contained only the two first counts. On the trial before Sedgwick, J. he expressed an opinion that the facts stated would not support an action of *indebitatus assumpsit*, but did not intimate that such action could not be maintained against a Corporation. The declaration was then amended by adding the special count, and a verdict taken for the plaintiff, subject to the opinion of the Court on the case as reported by the Judge. Judgment was afterwards rendered for the plaintiff by the whole Court.

Dexter, counsel for the defendant, in his argument, laid it down that "Corporations, to be bound by their contracts, must contract in a particular form. No implied promise can be raised against them. By the English law they can contract only under their common seal; perhaps the doctrine has never been carried so far in this country. But at least a vote is necessary—some evidence of an express promise."

Sedgwick, J. in delivering his opinion, says "that principals and masters should be responsible, *civiliter*, for the misconduct, negligence and default of their agents and servants, while acting under the authority delegated to them, is indispensable to the security of the rights and property of all, who may be affected by such misconduct, negligence or default. In no case is this principle of so much importance, as in the relation of Corporations to their servants: because in innumerable instances, they cannot act but by their agents; and there would be no security for those who might be affected by the agents, if they should abscond or be insolvent. This shows how improper it would be, as contended for by the counsel for the defendants, to oblige one injured in this way, to resort for his remedy to the agent." This case was decided in the year 1807.

Next was the case Mann *v.* Chandler, cited by the defendant's counsel in the principal case.—This case was decided in the year 1812.

The case Hayden et al. *v.* the Middlesex Turnpike Corporation, 10 Mass. R. 397, was an action of *assumpsit*. The declaration contained three counts—1st, for work and labour—2d, on a *quantum meruit* for the same labour—3d, on a special contract, stated to have been made with Bridge, one of the directors of said Company. On the trial, it was contended on the part of the defendants, that an aggregate Corporation cannot be charged on an implied *assumpsit*, and that Bridge had no authority to make the contract as stated in the plaintiff's declaration.

Sewal, J. in delivering the opinion of the Court, said, (in relation to Corporations) "We are, therefore, to look at their rules, and their mode of doing business, of well ordering their affairs, which they themselves have adopted:

and if they have practically, or by the rules established, neglected or dispensed with any precautions, which at common law were deemed essential to the security of aggregate Corporations, still if there is sufficient evidence of a common consent, of a joint and corporate act, they must be considered as liable; especially where individuals who have trusted to the good faith of the Corporation, would be injured and deprived of their remedy, if any other construction of the doings of the Corporation were adopted.

In short, this question, if there has been no direct decision upon it, has been implicitly determined by this Court in several cases which have occurred. The case of Gray *v.* Portland Bank may be mentioned as one, where the point was suggested: but the suggestion was overruled upon the authority of the case in Douglass, Rex *v.* the Bank of England, where the Bank was said to be liable in this form of action. Indeed, where the promise arises by implication of law, upon proving a duty, applicable and incident to the whole aggregate Corporation, their concurrence in the contract seems to be proved as fully as it can be in any case.

It is necessary to prove the duty upon which the *assumpsit* is supposed to arise. This may appear by evidence of some express stipulation, fairly made in the name of the Corporation, by their agent or directors, authorized by their rules and regulations, or by corporate votes. The duty may arise upon some act or request of the same agency, and within their authority, where no express stipulation is to be proved. But where the duty is fully implied and understood, and arises upon a meritorious and valuable consideration, the party entitled by the consideration may maintain this action of *assumpsit.*" This case was decided in the year 1813.

The case of the Bank of Columbia *v.* Patterson's administrators was decided by the Supreme Court of the United States in the year 1815. 7 Cranch 299, 307. In that case the Court observed upon the English authorities referred to, that "as soon as it was settled, that a regular appointed agent of a Corporation could contract in its name without a seal, it was impossible to maintain any longer that a Corporation was not liable upon promises; otherwise there would be no remedy against a Corporation." And the Court concluded by saying, "that it is a sound rule of law, that whenever a Corporation is acting within the scope of the legitimate purposes of the Corporation, all parol contracts made by its authorized agents are express promises of the Corporation. And all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the inforcement of which, an action will lie."

The case Danforth *v.* the Schoharie and Duanesburgh Turnpike Company, 12 John. Rep. 227, was an action of *assumpsit* on a special contract. This case was decided in the same year, 1815, in which the Court refer to and recognize the doctrine laid down by the Supreme Court of the United States, in the case Bank of Columbia *v.* Patterson's administrators. Judge Thompson in delivering the opinion of the Court says, "The objection taken to the declaration goes on the broad ground that an action of *assumpsit* will not lie against a Corporation. The proposition in this latitude is certainly not tenable. Although it may be laid down by elementary writers, as a general rule, that Corporations can do no act without a seal, and such would seem to be the doctrine of some old adjudged cases, yet the law of the present day seems to be other-

wise well settled. Corporations have in many cases been considered bound by their acts and agreements not under seal.

In Rex *v.* Bigg, 3 Peer Wm. 419, it was held that a Corporation might, without seal, duly authorize an agent to sign notes. And in Rex *v.* the Bank of England, Doug. 524, the Court refused to grant a *mandamus* to the Bank to transfer stock, because there was a remedy by an action on the case.

An attempt in some cases has been made to distinguish between express and implied promises as to the liability of a Corporation. 3 Mass. Rep. 364. 3 Dallas 496. But in a late case of the Bank of Columbia *v.* Patterson's administrators, decided in the Supreme Court of the United States, all such distinctions are disregarded, and the Court seem to go the full length of giving the same remedies against bodies corporate, in matters of contract, as against individuals. The old cases are there reviewed, showing that the law has been progressively altered with respect to the validity of acts done by Corporations, not under their seal."

The principles laid down in the case Bank of Columbia *v.* Patterson's administrators were more fully recognized and adopted by the Supreme Court of the State of New-York in the case Dunn *v.* the Rector of St. Andrews Church, 14 John. 118.

This was an action of *assumpsit* for work and labour. At the trial before the Court of Common Pleas, upon the general issue, the plaintiff proved by parol, that he had performed services for the defendants, as Clerk of the Church of the defendants, and in which divine service was performed by the Rector; and that the defendants had paid him money on account of such services; but a balance still remained due to him. This evidence being objected to, the records of the Corporation were produced, from which it appeared that the defendants had paid the plaintiff money at different times, on account of his services; but no resolution was entered on the minutes or records of the Corporation, appointing the plaintiff particularly Clerk of the Church. The defendants' counsel moved for a nonsuit, which was opposed by the plaintiff's counsel on the ground that the evidence was sufficient to show that the plaintiff had performed services for the defendants, at their request, express or implied: but the Court below delivered their opinion, that unless the plaintiff could prove by the records of the Corporation, that he had been, by a resolution, duly appointed to perform the services of Clerk in that particular Church, he could not maintain this action; and he was accordingly nonsuited. A bill of exceptions was tendered to the Court.—The case was brought before the Supreme Court by writ of Error, and the judgment reversed.—The following opinion was delivered by the Court: "The sole question arising on the bill of exceptions in this case is, whether an action of *assumpsit* upon an implied promise can be maintained against a Corporation. The case of the Bank of Columbia *v.* Patterson's administrators decided by the Supreme Court of the United States, and which is referred to by this Court in Danforth *v.* Schoharie Turnpike Company, goes the full lenth of making Corporations liable upon implied promises.

The evidence offered in the Court below in support of the action, showed conclusively that the services of the plaintiff were performed at the request of the defendants, and that they have advanced money to him on account of such services. This was amply sufficient to raise an implied promise to pay, and enough to maintain the action according to the principles sanctioned in

the case referred to, and which we are inclined to adopt. The judgment of the Court below must accordingly be reversed."

In this case it seems that a request by the Corporation was implied—not from any corporate act, but from the acts of the individual members of the Corporation; in the same manner as a request by a company of merchants may be implied from the acts of the individual members of the company. This arose from the nature of the services performed; each member of the Corporation received personally and directly the benefit of the services rendered, and the individual request of each one and all might well be implied. Not many cases analogous to this can arise, but in most cases some corporate act must be shown as a foundation of the liability of a Corporation. This last case was decided in the year 1817.

To the foregoing cases may be added the case of Randall *v.* Van Vechten, 19 John. 60, and the case of Mott *v.* Hicks, 1 Cowen's Rep. 513.

The rule then may be said to be fully settled by American cases; and we may say in the language of Woodworth, J. in delivering his opinion in the case Mott *v.* Hicks, "The great convenience of such a rule, indeed the necessity of it in many cases, to prevent a failure of justice, will not be doubted."

It is also well settled that if a person contract as agent, and do not bind his principal, he binds himself personally.

Sutherland, J. in delivering his opinion in the case Mott *v.* Hicks says, "It is perfectly well settled, that if a person undertake to contract as agent for an individual or a Corporation, and contracts in a manner which is not legally binding on his principal, he is personally responsible.—White *v.* Skinner, 19 John. Rep. 307.—Randall *v.* Van Vechten and others, 19 id. 60.—Taft *v.* Brewster and others, 9 id. 334.—Tippits *v.* Walker, 4 Mass. Rep. 595.—7 T. R. 207, Thomas *v.* Bishop, Cas. Temp. Hard 1. 3 John. Cas. 70. And the agent when sued upon such contract, can exonerate himself from personal liability only by showing his authority to bind those for whom he has undertaken to act. It is not for the plaintiff to show, *that he had not authority*; the defendant must show affirmatively that he *had*. But as the authority of the defendant to act for the Company on this occasion was not questioned at the trial, we are now, perhaps, bound to presume it."

Although the law is thus settled, that actions of *assumpsit* may be maintained against Corporations on contracts made by their agents, and that the authority of the agent need not be under the corporate seal, yet as this principle has been but recently settled, and such actions are but of modern date, questions of some difficulty will probably arise in the decisions of these cases as to the evidence necessary to show the authority of the agent, or the liability of the Corporation in particular cases. The law has long been well settled, as to the power which one partner has to bind his co-partners. His power does not arise from the joint act of the partners, and is limited only by the articles of partnership and the extent of the partnership's business. He has power to bind his partners by contract, merely as a member of the Company. But Corporations can be bound only by the acts of a majority—no individual member, as such, can bind the Corporation by contract, in any case whatever. The powers and authority of an agent of a Corporation must therefore have for its foundation, an act or vote of the Corporation, and this as it respects all species of Corporations publick and private. And yet, may not a distinction be taken between different Corporations as to the extent of the powers of their

agents? Will they not in some cases be more limited than in others? In the case of municipal or publick Corporations, which are in some degree constituent parts of the Government, such as cities, towns, parishes, school districts, &c. the powers of their agents are strictly confined within the letter of the corporate acts conferring the powers. This is obviously necessary to afford any tolerable degree of security to such Corporations against the misconduct of their agents. Publick interests are seldom watched over with that care that individual interests are; and those with whom the agents contract have a reasonable degree of security that the Corporation will be bound by the contracts of the agent; for the records of the Corporation evidencing the appointment and limiting the powers of their agents, are public records, and may be resorted to by all: Beside, the agent and the person with whom he contracts, are usually members of the same Corporation.—There is little danger, therefore, that the agent can exceed his powers if he be disposed to do so. Not so with private Corporations, such as Turnpike and Manufacturing Companies.—Their records are not publick records, and they frequently contract, I might say, more usually, contract with those who are not members of the Corporation, and are not conversant with their proceedings. Suppose then a town appoint an agent to make a road or build a bridge, and authorize him to make contracts for making the road or building the bridge, but specially limit his powers to the making of the contracts in writing, would there be a doubt that any verbal contract which he should make would be void? How would this be in the case of a Turnpike Company?—The Company appoint an agent to make their road—authorize him to make contracts for making their road, and in the same manner limit his powers to the making of contracts in writing.—The agent proceeds and enters into verbal contracts for making the road, under which the road is completed—Is the Company liable upon these contracts of the agent? or is it a valid defence on the part of the Company that the contracts were not in writing, that the agent had exceeded his powers, as we have seen it would be in the case of a publick Corporation? Suppose the proprietors of the road are not incorporated, but enter into partnership for the purpose of making the road, and stipulate in their articles of partnership, that all contracts for making the road shall be in writing; and one of the partners take the whole charge of the business—enters into verbal contracts, under which the road is completed, would it be a valid defence for the Company in a suit on such contract, that the contract was not in writing, unless it should appear that the plaintiff had a knowledge of the stipulation which the parties had entered into, that all their contracts should be in writing? and what is the difference between the two cases? This difference is at once seen. To show the incorporation of the Turnpike Company will not show any authority in the agent who made the contracts, although a member of the Corporation; but an act of the Company must be shown, conferring upon him power to enter into contracts for making the road—in the other case, showing the partnership will show the authority of the acting partner to bind the Company. But could the Turnpike Company shelter themselves under the restrictions laid upon the agent any more than the partners could?

I have been led to this inquiry by the case of Heyden et al. *v.* the Middlesex Turnpike Corporation, before referred to for another purpose. I will give the whole of the case which relates to this point in as condensed a form as possible.

The action was brought by the plaintiffs *v.* the Middlesex Turnpike Corporation on a *quantum meruit*, for work and labour done on the road of the Corporation. The labour, services, and articles furnished, were all on account of work done on a part of the Turnpike which the directors had agreed to make, and which had been put under the directions of General Bridge, one of the directors. Gen. Bridge was frequently present—knew the work was going on, and from time to time gave directions as to the manner of executing it. Others of the directors were frequently present. And O. Holden, one of their number, testified that he supposed that the work was going on by order of the directors.

By the 4th article of the by-laws of the Corporation, it was provided that "the directors shall have power to do whatever the Corporation may lawfully do, which they may think will be for the benefit of the Corporation."

On the 29th of November, 1815, the directors voted that Gen. Bridge be a committee to stake out the road. Also that he be authorized to contract for making any part of said road, as soon as he shall meet with contractors for the same, one third part to be paid in shares. On the 26th of December, 1815, the directors voted that "all contracts made by committees in behalf of the Corporation shall be made in writing, and delivered to this board to be filed with their papers."—Voted that it is the intention of this board, that all contracts made for making the road, according to the vote of Nov. 29th, be one third paid in shares in the road, additional to all shares subscribed for before such contract.—Voted to reconsider all votes passed previous to the present meeting, for making contracts for making any part of the road, excepting such contracts as are already made by any committee, agreeably to the order of the board, and now accepted." Gen. Bridge was present at this last meeting, but did not mention any contract made by him, although several other contracts were considered and accepted.

On the trial it was contended on the part of the defendants, that Gen. Bridge had no authority to bind the Corporation in this case, which was overruled by the Judge.

A verdict was taken for the plaintiffs, subject to the opinion of the Court, whether the evidence in the case rendered the Corporation liable in this action.

The case was afterwards heard before the whole Court.

Sewal, J. in delivering the opinion of the Court upon the point under examination says, "The doubt principally arising in the case at bar, is upon the evidence offered to prove a duty of this Corporation, as arising upon the consideration, upon which the plaintiffs would entitle themselves. They prove no request of Gen. Bridge, or of the directors, *as such*, or of any person acting or professing to act in the name and behalf of the Corporation. The plaintiffs claim the amount of their disbursements for work done on the Turnpike road. The disbursements, or the application of them, are not disputed; and Gen. Bridge and other members of the Corporation saw the men at work, who were employed and paid by the plaintiffs. But this evidence does not prove a request to the plaintiffs, *by the Corporation*, or by their directors, or by their authorized agent; or any stipulation expressed or implied, to authorize a charge against the Corporation for these disbursements. What is proved may have happened under a contract with Gen. Bridge for himself individually, or

in behalf of the Corporation; and this contract it may be convenient in certain events to suppress.

In the votes of the directors, and the authority given to Gen. Bridge, he was directed to make his contracts for the Corporation in writing: and contracts, not reported and recognized at a certain meeting, were there rescinded, at least so far as to revoke the authority given to Gen. Bridge, or any other agent of the directors, for any contract not then reported for allowance and confirmation. Gen. Bridge was then present, and stated nothing of any contract with the plaintiffs.

It is also to be observed, that the authority given to Gen. Bridge and the other agents, seems to have required invariably to pay one third in Turnpike shares. No contract by Gen. Bridge as agent of the Corporation would be valid to charge them from which that stipulation was omitted.

No individual member can represent the Corporation in their aggregate capacity, but in consequence of their consent. The requisite evidence of this, at common law, was a deed under the seal of the Corporation. Aggregate Corporations, established by statute, are not restricted to that formality. They have powers given them to order their affairs, and to appoint and to employ agents by their votes; or in such other manner as the Crporation may by their by-laws direct. But no person is an agent for them who proceeds without any authority, either by letter of attorney, or by a corporate vote, or who acts beside the authority given him; that is, his acts will not charge them, unless subsequently assented to by some act of the Corporation.

Upon the whole we see no sufficient authority which Gen. Bridge had to bind the Corporation so as to subject them to this demand of the plaintiffs. The verdict taken in the case is therefore set aside and a new trial granted.

This note has already been drawn out to a greater length than was intended; I shall therefore close with a few remarks on the last case.

The evidence on the part of the plaintiffs, was sufficient to charge General Bridge as the owner and proprietor of the road.—Consider him as the owner, and the evidence was sufficient to prove, satisfactorily, that the work was done at his request: but he acted as agent. Now consider him as the agent of an individual owner of the Turnpike, was he a general agent, or a particular or special agent?—if the former, the evidence was sufficient to charge the principal—if the latter, it was not; as it appears that he deviated from his instructions. The difference between a general and particular agent, is illustrated by Ashurst J. in the case Fenn v. Harrison, 3 T. Rep. 760, by the case commonly put, as follows: "And that brings it to the case put at the bar, of the sale of a horse, where I take the distinction to be, that, if a person, keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the publick cannot be supposed to be cognizant of any private conversation between the master and the servant; but if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the general scope of his employment." The reason for the distinction between the two cases is obvious: in the former case, the purchaser has evidence of the

employment of the agent by the principal, from the act of the principal himself, finding the agent in his employment actually superintending his business. In the last case, the purchaser has no evidence of the employment or agency of the seller, from any act of the principal, but relies solely on the declarations of the agent; and as he relies on him solely, so he must look to him solely, if he exceed his instructions. In the first case the purchaser might well rely on the agent, as he had a right to conclude that the principal would intrust honest men only in his business: if he do not, it is fit that *he* should be the sufferer, not the *purchaser* who had been thus rationally induced to trust the agent, by the act of the principal. And, as the purchaser had no means of knowing the private instructions given by the principal to his agent, he shall not suffer by them.

Now to which class of agents did General Bridge belong?—was he the general, or *particular* agent of the Turnpike Company? By the corporate act of the Company he was appointed their agent to stake out their road, and to enter into contracts for making it. And it must be taken that the plaintiffs found Bridge in the actual employment of the Company, staking out the road and proposing to contract for the making of it. It would seem, then, that the Company had themselves given such evidence of the agency of Bridge, as to constitute him their general agent, and enable him to bind them by his contracts as agent, if made within the general scope of his employment—the making of the road. But no express contract between him and the plaintiffs for the making of the road was proved; it was, however, admitted that the plaintiffs performed the labour, for which they claimed a compensation, in making the road, under the superintendance of Bridge, who, we have seen, was the agent of the Turnpike Company. And we have seen that this is sufficient to prove that the work was performed by the plaintiffs at the request of Bridge, taking him to be the owner of the road, and would render him personally liable to pay for the services. But as Bridge acted as the authorized agent of the company, and the services were performed, within the general scope of his employment, the evidence proved a request by the Corporation and rendered them liable—not Bridge personally, unless a distinction be taken between the case of an agency under a private Corporation, and an agency under an individual. When we advert to the reasons on which the principal is bound by the acts of his general agent, although the agent deviates from his instructions, to wit, because the publick cannot be supposed to know what are the private instructions given by the principal to the agent, we shall perceive that there is no solid distinction between the two cases; for the publick cannot be supposed to know any thing more of the acts, votes and records of a private Corporation than they do of the acts, papers and instructions of an individual. In the present case the plaintiffs had no means of knowing, and cannot be supposed to have known any thing of the votes or records of the Corporation, or of the directors, who seem to have been made the substitute of the Corporation. If correct in this, though not so in any part of what precedes, it follows that the general principles of the common law, in relation to principal and agent, will apply to all cases of agency under a private Corporation. It appears by the opinion of the Court, in the case under consideration, that a different view was taken of this subject, probably a more correct one. Although it does not very distinctly appear, yet it seems that a distinction was taken

between a private Corporation and an individual, as relates to the authority of their agents to bind the principal, and that for the performance of services for the benefit of a Corporation, a request by the Corporation cannot be implied from the conduct of the agent.

Since private Corporations have become so numerous, and their business so extensive, which as we have seen must be transacted by their agents, all questions relative to the powers of their agents to bind them by contract, have assumed an importance, which induced me to present some of them to the profession for examination.

INDEX

TO

THE PRINCIPAL MATTERS

IN THE FIRST VOLUME.

A

ADMINISTRATION BOND.

1 In an action on an Administration Bond, given by Aaron Thrall, administrator of Aaron Read deceased, by the administrators *de bonis non* of said Aaron Read, prosecutors, it was held no breach of the condition of such bond, that by a reference made under an order of the Judge of Probate by the consent of parties, that is, of the said administrators *de bonis non* of Aaron Read, and of the administrators of the said Aaron Thrall deceased, a certain sum was awarded in favour of said administrators *de bonis non* of Aaron Read against the administrators of Aaron Thrall, as the amount of the estate of the said Aaron Read, remaining in the hands of the said Aaron Thrall, at the time of his decease, and that the sum had not been paid. *Probate Judge* v. *Pratt.* 233

2 The condition in an administrator's bond to the Judge of Probate, that the administrator shall make, or cause to be made a true and just account of his administration, is not broken by a neglect in the administrator to pay the debts and make a distribution of the estate of the deceased. *ib.*

3 If an administration bond be prosecuted before a County Court, and a judgment rendered for the penal sum of the bond, a *scire facias* brought on such judgment by a creditor or other person interested in the estate, to recover the amount of his claim agreeably to the statute, must be brought before the same Court, notwithstanding such claim, as to the amount of the demand, be within the jurisdiction of a Justice of the Peace. *Hoit* v. *Bradley et al.* 262

4 If an administrator neglect or refuse to pay the heir the sum which the Judge of Probate has, on a distribution of the estate, decreed to be paid to him, within the time

limited by such decree, if demanded, it is a breach of the condition of the administration bond, and an action will lie on the bond immediately—a previous suit against the administrator being unnecessary. *Probate Judge* v. *Fillmore.* 420

ADMINISTRATOR.

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See TRUSTEE Action.

APPEAL.

1 Each party has a right to an appeal from a judgment rendered by a County Court to the next stated or adjourned term of the Supreme Court, and if one party enter an appeal to the next stated term of the Supreme Court, the opposite party may, notwithstanding, enter an appeal to the next adjourned term of the Court, and such appeal will be sustained. *Hastings* v. *Hodges* and *Parker.* 124

2 If either party after judgment in the County Court, enter a review of the cause to the next term of the Court, the opposite party may, notwithstanding, enter an appeal of the same cause to the Supreme Court, and such appeal will be sustained. *Hubbard appellant* v. *Leonard appellee.* 216

3 If an appeal be entered from a judgment rendered by a County Court, to the Supreme Court, and the appellee recover judgment in the Supreme Court, although for a less sum than he recovered in the County Court, it is an affirmance of the judgment of the County Court, within the meaning of the condition of the recognizance for the prosecution of such appeal. *Page* v. *Johnson et al.* 338

4 It is not necessary for the appellee in such case to take out execution on the judgment, in order to charge the bail on the recognizance. *ib.*

ARBITRATION.

See BOND 3.

ASSAULT AND BATTERY.

See JURISDICTION 2.

ASSUMPSIT.

1 If money be paid by A. to B. on a note which B. holds against A. and B. refuse to indorse it on the note, or allow it in payment, A. may recover the amount of B. in an action of *indebitatus assumpsit* for money had and received, although the note still remain unpaid. *Eastman* v. *Hodges.* 101

2 A. as principal and B. and C. as sureties signed a note payable to the Vermont State Bank. The note was discounted and the money paid to A. the principal: by mistake the note was afterwards delivered up to A. $250 being unpaid and remaining due on said note.—Held that *assumpsit* would lie in favour of the Bank v. A. for the said sum of $250. *Vermont State Bank* v. *Stoddard.* 157

3 There are cases, where, from the fraud practised by the seller of property, the purchaser may rescind, and by an action of *indebitatus assumpsit* recover back the

purchase money; but can in no case maintain such action for the consideration paid, without a previous offer to the seller to rescind, and a demand of the sum paid for the property. *Warner* v. *Wheeler.* 159

4 Evidence that the plaintiff had made a contract with A. to cut on the land of A. and draw and deliver to him a quantity of spars—that the plaintiff had on such contract cut and trimmed forty spars, which the defendant took and delivered to A. and received the money from A. for cutting and drawing the spars, will not support a declaration counting on a special promise by the defendant to deliver to the plaintiff forty spars, nor a count for goods sold and delivered, as the spars taken were not the property of the plaintiff. *Weed* v. *Butterfield.* 161

5 *Assumpsit* will not lie against a Sheriff or other officer for a misfeasance or nonfeasance in the execution of his official duties. *Walbridge et al.* v. *Griswold.* 162

6 An action of general *indebitatus assumpsit* for monies paid, laid out and expended, will not lie in favor of one town against another, to recover monies expended for the support of a pauper; the action in such case must be brought on the statute, stating a case within some one of its provisions. *Middlebury* v. *Hubbardton.* 205

7 The action of *indebitatus assumpsit* is an equitable action, and the plaintiff can in no case recover more than he is in equity and good conscience entitled to. *Wheeler* v. *Shed.* 208

8 A declaration in *assumpsit*, on a special contract to deliver cloth to the plaintiff, is not supported by evidence of a contract to deliver cloth at the defendant's factory; but the variance between the declaration and the contract proved is fatal. *Clarke* v. *Todd.* 213

9 A due-bill in the following words, "Due F. H. eighty dollars on demand," will support an action of *indebitatus assumpsit* for money lent. *Hay* v. *Hyde.* 214

10 A promise of marriage made by an infant is void. *Pool* v. *Pratt.* 252

11 In an action on a warranty upon the sale of a horse, if the declaration be that the defendant warranted that the horse was not over seven years old, and the proof be that the defendant warranted that the horse was seven years old the next spring after the sale, it is not a variance between the proof and the declaration. *Henry* v. *Henry.* 265.

12 If A. promise B. to pay him $150 for L. C. when he shall come of age, L. C. can neither maintain an action on the contract nor discharge it. *Tuttle* v. *Catlin.* 366

13 An action of *assumpsit* will lie against a Corporation on a promissory note or other simple contract made by their agent, duly authorized to make such contract. *Proctor* v. *Webber.* 371

14 A purchaser of real estate may protect his purchase by such covenants as he may deem necessary; but if he accept a quit-claim deed, a mere failure of title furnishes no ground for recovering back the purchase money. *Higley* v. *Smith* and *Boyden.* 409

ATTACHMENT.

1 Money collected by an officer on an execution cannot be attached while in his hands, as the property of the creditor in the execution. *Conant* v. *Bicknell.* 50

2 In case personal property be at-

tached on mesne process, if execution be taken out and delivered to the same officer who served the attachment, within thirty days from the time final judgment was rendered in the suit, it is a taking of the property in execution, within the meaning of the 33d section of the judiciary act; and the property is not discharged from the attachment, although the execution be not actually levied upon the property within thirty days. *Enos* v. *Brown* 280

3 In an action in favour of a Sheriff or other officer on a receipt for property taken by attachment, in which receipt is a stipulation to return the property on demand or pay all costs and damages the value of the property receipted is the measure of damages. *Catlin* v. *Lowrey*. 396

AUDITA QUERELA.

M. caused an execution in his favour *v.* H. to be levied on a certain tract of land in part satisfaction of the execution; but the tract of land described in the Sheriff's return on the execution was not shown to the appraisers, or appraised by them, but a different tract of land, containing the same quantity of acres, but of less value than that described in the Sheriff's return.—Held that H. the debtor was entitled to relief by *Audita Querela*, and the levy of the execution was set aside. *Hurlbut* v. *Mayo*. 387

B

BAIL.

In an action against the Sheriff for taking insufficient bail on mesne process, if the defence be that the bail was sufficent when taken, it is necessary for the defendant to prove that the bail when taken had a substantial property, amply sufficient to answer the demand, and that would probably continue so; proof that the bail were ostensibly but not really possessed of sufficient property will not exonerate the Sheriff. *Hazard* v. *Slade*. 199

BILL OF REVIEW.

A Bill supplementary to a Bill in Chancery, a Bill of revivor, Bill of review, or Bill to carry into effect a former decree, must be brought in the same County, where the original suit was brought, and where the proceedings are of record. *Ferris et al.* v. *Childs et al.* 336

BOND.

1 The condition of a Bond that A. shall within five months from date establis B. in possession of the land described, will admit of different constructions and may be explained by parol proof. *Campbell* v. *Hyde*. 65

2 Evidence of a performance of the condition will not support a plea of accord and satisfaction. *ib.*

3 The condition of an arbitration bond, in the following words—"Now if the said L. J. shall make his appearance before said arbitrators, by himself or attorney, on the day aforesaid, and shall pay and discharge all such sums of money, as said arbitrators shall award, contains two independent stipulations; first that the obligor shall appear before said arbitrators, and secondly that he will pay such sum as shall be awarded against him; and the appearance of the said J. L, being in its nature precedent to

an award, a plea of no award is insufficient. *North* v. *Johnson*. 131

4 Where the condition of a bond is simply to indemnify and save harmless the obligee from the payment of a debt or damages, the condition is not broken, until the obligee has been compelled to pay, or having become liable to pay has actually paid the debt or damages, or has been arrested or in some way has sustained actual damages. *Selectmen of St. Albans* v. *Curtis*. 164

5 In an action on an indemnifying bond given to the Sheriff, in assigning breaches of the condition, it is necessary to aver that the deputy had been negligent in the performance of some official duty; that, in consequence of such negligence, the Sheriff had become liable; and that the creditor, or person injured by such negligence, had commenced an action against the Sheriff, and had recovered a certain sum, for his damages and costs for such neglect of the deputy. *Hyde* v. *Childs*. 230

C

COLLECTOR OF LAND TAXES.

1 If a collector of a land tax, neglect to lodge in the Town Clerk's office or other proper office, an account of his proceedings within thirty days from the close of his vendue for the sale of lands, his sales are void, and no title is acquired under such vendue. *Mead administrator of Lee* v. *Mallet and Swift*. 239

CONFIRMATION CHARTERS.

1 Grants of lands in this State by the Governor of the late Province of New-Hampshire, while this territory was within that Province, are in their construction and operation Royal Grants; and, on a surrender of such Grant, the King was in of his former right, and might, at his pleasure, grant the same lands again, and such second grant would be valid. *Paine and Morris* v. *Smead*. 56

2 A surrender of a New-Hampshire Charter to the Governor of New-York, while this territory was annexed to that Province, enabled him to regrant the same lands; and such grant made in confirmation of the right under New-Hampshire is valid. *ib.*

3 Such surrender may be proved by parol. The recital in such confirmation charter, of a surrender of the New-Hampshire Charter, is *prima facie* evidence of such surrender. A long acquiescence of the New-Hampshire proprietors under such confirmation grant, will be construed a waiver of the grant under New-Hampshire, and a confirmation of the grant under New-York. *ib.*

CONSIDERATION.

If the suppression of evidence in a criminal prosecution constitute any part of the consideration of a contract, such contract is void. *Badger* v. *Williams*. 239

CONSTITUTIONAL LAW.

1 An act of the Legislature directing a deposition to be read in the trial of a cause, is an interference with the judiciary department; is retrospective in its operation, a legislative sentence rather than a law and void; being against the constitution of the State, and the con-

stitution of the United States. *Dupy quitam* v. *Wickwire.* 237

2 A special act of the Legislature freeing the body of a debtor from imprisonment, and discharging a bond given to the Sheriff by the debtor on his admission to the liberties of the prison, in a case where the debtor had escaped and the bond was assigned before the passing of the act, is a law impairing the obligation of contracts, a violation of the constitution of the United States, and void. *Star* v. *Robinson.* 257

CORPORATION.

An action of *assumpsit* will lie against a Corporation on a promissory note or other simple contract, made by their agent, duly authorized to make such contract. *Proctor* v. *Webber.* 371

COVENANT.

1 A Covenant in a deed by B. conveying land to E. in these words, "That said E. shall hold the premises, so that neither I the said B. my heirs or assigns, or any person claiming under me or them, or under New-Hampshire, shall ever have any right, title, interest or demand thereto, but shall by this deed be forever barred and excluded," has not the same legal effect as a covenant of seisin or a covenant of warranty. *Evarts* v. *Brown* 96

2 To show a breach of such covenant it is not necessary to show an eviction, as in an action on a covenant of warranty; nor is it broken by a dormant title not put in exercise; but if a person be in possession holding under New-Hampshire, adverse to the plaintiff's title, it is a breach of the covenant. *ib.*

3 It is a breach of a covenant of warranty in a conveyance of land, if final judgment in ejectment be rendered against the grantee, although he continue in possession of the land by means of a subsequent purchase. *Drury and Strong administrators of Strong* v. *Shumway.* 110

4 In an action for a breach of such covenant of warranty it is a general rule, that the value of the land at the time of the eviction, with interest from that time until the time of rendering the judgment, is the measure of damages, but there are exceptions to this rule. In a case where the plaintiff in an action of covenant, had, on eviction, recovered of the plaintiff in ejectment, a sum for his betterments, that sum will be deducted from the value of the land in assessing damages. *ib.*

COUNTY COURT.

The Judges of a County Court, on application of a defendant, may in their discretion, in cases not provided for by statute, set aside a judgment rendered on default, on such conditions, to be performed by the defendant, as they may, in their discretion prescribe; such as payment of costs to the plaintiff, or waiving some advantage which he may have of the plaintiff, and such proceeding cannot be re-examined in this Court on writ of error. But if, in granting such favour to the defendant, the Court order the plaintiff to enter his action anew, and, on his refusal to pay the Court fees for such entry, order a non-suit, it is error, and the judgment will be reversed. *Hall* v. *Grinwold.* 107

COURT OF PROBATE.

See ADMINISTRATION BOND.

D

DAMAGES.

In every case coming within the 75th section of the judiciary act, where the sum for which judgment ought to be rendered is uncertain, either party has a right to have the damages assessed by a Jury; and if a motion be made by either party to have the damages so assessed by a Jury, and the application be refused, and the motion dismissed by the Court, it is error, and the judgment rendered in the case will be reversed. *Benham* v. *Sage et al.* 247

See COVENANT 4.—ESCAPE 1.

DECLARATION.

1 A Declaration defective in point of form, may be aided by the plea, but is not aided by the plea if the defects are in matter of substance, unless the matter omitted in the declaration be admitted by the plea. *Ralston* v. *Strong.* 287

2 In a Declaration on a recognizance for the prosecution of an appeal, it is necessary for the plaintiff to aver that the defendant has not answered or paid the intervening damages and costs. *Page* v. *Johnson et al.* 338

3 A note payable in specifick articles may be declared on as a specialty or promissory note under the 3d and 4th of Anne. The plaintiff is not required to state in his declaration nor to produce evidence on trial, to prove a consideration, except to rebut evidence produced on the part of the defendant to prove a want of consideration; but it is necessary for the plaintiff to make all other averments as in a declaration on a verbal contract. *Brooks* v. *Page.* 340

4 In a Declaration on a note for the payment of $100 at the defendant's dwelling-house in Middlebury, on the first day of June, 1812, in horses to be appraised by three men, the plaintiff averred, that the defendant had not performed tho' often requested, to wit, at Middlebury on the first day of June, 1812; the Court held that this did not amount to an averment that the defendant was at the dwelling house of the defendant in Middlebury on the first day of June, 1812, ready to receive payment. *ib.*

DEED.

1 If A. convey land to B. and B. neglecting to record his deed convey the land to C., and D. having knowledge of such conveyance, fraudulently procure from B. his unrecorded deed—deliver it back to A. and take a deed to himself from A. and convey the land to E. E. having no knowledge of the aforesaid conveyances, E. as a *bona fide* purchaser will hold the land against C. *Morrison et al.* v. *Shattuck et al.* 42

2 And if C. convey the land to F. he having full knowledge of all the above facts, F. is not entitled to a remedy either in law or equity against D. *ib.*

3 If A. convey land to B. and afterwards convey the same land to C., B. being present witnessing the deed and receiving a part of the consideration, C. will hold the land against B. *Ivers* v. *Chandler.* 48

4 If A. convey land to B. who neglects to record his deed, and A. convey the same land to C. who procures his deed to be first recorded, if C. had knowledge of the prior conveyance to B. his deed is fraudulent and void, and B. will hold the land. *Ludlow* v. *Gill.* 49

5 The statute regulating conveyances, provides, as a general rule, that every deed of conveyance shall be acknowledged before a magistrate; and if proof of a deed be taken before a Judge, the certificate of such proof must state those facts which take the case out of the general rule, and bring it within some one of the exceptions made by the statute authorising such proof to be taken before a Judge. *Pearl* v. *Howard.* 173

6 Notice to one of two or more partners of a prior unrecorded deed is notice to all the partners, and will render void a subsequent deed of the same lands, to all the partners. *Barney et al.* v. *Jewett et al.* 315

7 If husband and wife join in a conveyance of real estate which the husband held in right of his wife, the purchase money received by the husband becomes his personal property. If the husband with the avails of such estate, purchase other lands and take a deed to his infant son and hold the same unrecorded, it remains absolutely under his control, and the son can have no remedy against the father, or any other person either for the deed or the lands therein described. *Ward* v. *Morrilet al.* 322

8 If an administrator, under an order of the Court of Probate sell real estate, and, to secure the payment of the purchase money take to himself a mortgage of the same or other estate, and such mortgage be foreclosed, the title of the estate so mortgaged vests in the administrator in his private capacity. *Higley* v. *Smith and Boyden.* 409

DEPOSITION.

1 If in a caption of a Deposition it be certified that the deponent was cautioned to testify the truth the whole truth and nothing but the truth, yet if the certificate of the oath be that "the deponent was sworn to the truth of the deposition," such deposition cannnot be read in evidence. *Burroughs* v. *Boothe.* 100

2 The magistrate taking a Deposition, certified as a reason why the opposite party was not notified of the taking of the Deposition, that he resided more than twenty miles from the place of caption—held the deposition could not be read in evidence, and that parol evidence was not admissible to prove that the deponent lived more than thirty miles from the place of caption. *Chipman* v. *Tuttle.* 179

3 A Deposition taken in a foreign government, cannot be read in evidence unless it be shown to the Court that the magistrate before whom it was taken was authorized by the laws of such government to take Depositions. *Bown and Eddy* v. *Bean.* 176

4 A Deposition taken in another State cannot be admitted, unless it appear that the magistrate before whom it was taken was authorized by the laws of such State to take Depositions. *Patterson* v. *Patterson.* 200

5 A Deposition taken to be used in a *quitam* action is admissible and may be read in evidence, although in the caption the prosecutor be

stated as the sole plaintiff, the *quitam* being omitted. *Dupy quitam* v. *Wickwire.* 237

DEPUTY SHERIFF.

See SHERIFF 2—7.

DISCLAIMER.

See EJECTMENT 5.

DISTRIBUTION OF INTESTATE ESTATE.

The Judge of Probate before issuing his decree for a Distribution, must ascertain and declare who are the persons entitled as heirs, and in what proportion—what advances had been made by the deceased in his life-time to the heirs, or either of them—what lands belong to the estate to be divided, and what lands belonging to the estate are holden jointly or in common with others; and all persons interested in such distribution must be notified. *Ex parte Moses Robinson and others.* 357

See ADMINISTRATION BOND.

DUE-BILL.

A Due-Bill in the following words, "Due F. H. eighty dollars on demand," will support an action of *indebitatus assumpsit* for money lent. *Hay* v. *Hyde.* 214

E

EJECTMENT.

1 If a plaintiff in Ejectment fail of showing a title to the whole of the land described in his declaration, he may still recover a part in severalty, or an undivided part according to his title. *Chapin* v. *Scott.* 41

2 Actual seisin is a sufficient title for a plaintiff to recover against a stranger, that is, against a person who has without right trespassed upon the prior occupancy of the plaintiff. *Ellithorp* v. *Dewing.* 141

3 If the defendant in an action of Ejectment prove that he purchased the whole of the lot demanded, went into possession and cleared one acre more than fifteen years before the commencement of the plaintiff's action, he will hold the whole lot by the statute of limitations; the possession of a part under such purchase being a possession of the whole, is a bar to the plaintiff's action. *Pearsall* v. *Thorp.* 92

4 In an action of Ejectment, if the plaintiff show that the defendant claims under the same proprietary division on which the plaintiff relies, it is not necessary for the plaintiff to show a legal division; yet if the action be brought for a certain lot in a certain division, and there be no other description of the land in the declaration, it is necessary for the plaintiff to shew a division in fact. *Bown and Eddy* v. *Bean.* 176

5 In an action of Ejectment against two, father and son, if it appear that the father had no claim to the premises, but was living with his son on the premises, as a lodger, having no concern with the occupation or management of the farm, he will not be considered in possession of the premises, but on a disclaimer will recover his costs against the plaintiff. *Jones* v. *B. and W. Webber.* 215

6 If a collector of taxes omit to lodge

in the Town Clerk's office, or other proper office, an account of his proceedings within thirty days from the close of his vendue for the sale of lands, his sales are void, and no title is acquired under such vendue. *Mead administrator of Lee* v. *Mallet and Swift.* 239

7 In an action of Ejectment against landlord and tenant, an appearance entered by attorney for both defendants is not conclusive against the landlord, but he will be permitted to prove, by whose order or procurement the attorney entered such appearance; and even if it appear that the attorney entered such appearance by the direction of the landlord, yet this will not preclude the landlord from showing that the judgment rendered in the action against him was obtained by collusion between the plaintiff and the tenant. *Rider* v. *Alexander and Kathan.* 267

8 If the plaintiff and defendant in an action of Ejectment both claim the same lot under the same division, they are both estopped from denying the legality of such division. *Bush* v. *Whitney.* 369

9 Where the proprietors of a town, at a proprietors' meeting, make a division of the town into severalty, by voting to the persons claiming the different rights, certain lots in lieu of their drafts, such votes are no evidence of title, not even *prima facie* evidence against each other. *Smith et al.* v. *Meacham.* 424

ENDORSEE OF A PROMISSORY NOTE.

1 If the Endorsee of a Promissory Note, not negotiable, commence an action on the note in the name of the original payee, and in his name obtain judgment and execution, and cause such execution to be levied on personal estate, if such estate be appraised on the execution, the title to the estate is by the appraisal vested in the endorsee and not in the original payee of the note. *Richards* v. *Pearl and Phelps.* 113

2 But, to show such right in the endorsee, it is necessary for him to produce a copy of the judgment, before he can read in evidence a copy of the execution and levy. *ib.*

3 If a note, not negotiable, be endorsed before it has fallen due, in an action on such note in favour of the endorsee against the endorser, parol evidence is admissible on the part of the defendant, to prove an agreement made, at the time of the transfer, between the endorser and endorsee, that the endorsee should pursue the maker of the note by action, and have recourse to the endorser only in the event of his being unable to collect the note of the maker. *Miner* v. *Robinson.* 392

4 In an action by the endorsee of a promissory note against the payee of the note as endorser, parol evidence is admissible on the part of the defendant, to prove that he placed his name on the note in blank, for the purpose of enabling A. to whom he delivered the note, to collect it for his (the defendant's) use, although A. had sold the note to the plaintiff, and he had filled up the endorsement to himself. *Rhodes* v. *Risley.* 52

ERROR.

1 The Judges of the County Court, on application of a defendant, may,

in their discretion, in cases not provided for by statute, set aside a judgment rendered on default, on such conditions, to be performed by the defendant, as they may in their discretion prescribe; such as the payment of costs to the plaintiff, or waiving some advantage which he may have of the plaintiff in the case, and such proceeding cannot be re-examined in this Court on Writ of Error. But if, in granting this favour to the defendant, the Court order the plaintiff to enter his action anew, and on his refusal to pay fees for such entry, order a nonsuit, it is error, and the judgment will be reversed. *Hall* v. *Griswold.* 107

2 That the persons sitting as Judges, holding a Court and rendering a judgment, were not qualified as Judges, cannot be assigned for error; such assignment of error being an allegation that the proceedings are a nullity—that there is no record to be examined—no judgment to be reversed. *Adams* v. *Wheeler.* 417

ESCAPE.

1 In an action against a Sheriff for an Escape on mesne process, the plaintiff is entitled to the amount of his debt, if it appear that his debtor has absconded and is insolvent; but before the Court will render judgment on the verdict, the plaintiff must enter into a rule, that the defendant may make use of his name, in recovering the debt to his own use, the defendant indemnifying the plaintiff from costs. *Oliver* v. *Chamberlain.* 41

2 If a debtor escape from prison with the consent of the Sheriff, the Sheriff cannot lawfully retake him, yet the creditor may, or he may have his remedy against the Sheriff by an action for the escape, or against the debtor by an action of debt on the judgment. *Farnsworth* v. *Tilton.* 297

EVIDENCE.

1 Great latitude is in many cases allowed in the admission of evidence under the general issue; but in cases of special pleading, the parties are strictly confined to the facts put in issue; therefore, if the plaintiff traverse a plea in bar, he cannot give in evidence matter in avoidance of the plea, & can avail himself of such matter by a replication only. *Campbell* v. *Hyde.* 65

2 In an action of trespass against a town or parish collector, the defendant may under the general issue, give in evidence his authority to take the property in question, but cannot give in evidence a release of the trespass, or any matter which does not shew the taking lawful. *Wilcox* v. *Sherwin.* 72

3 The statute laws of any one of the United States, if printed under the authority of such State, may be read in evidence in the Courts of this State. *State* v. *Stade.* 303

EXECUTION.

1 If an Execution be levied on personal property, and by the officer making the levy the property be delivered to a third person, on a receipt containing a stipulation to redeliver the property on demand, the officer does not thereby part with his lien on the property, but may at any time take it into his possession. And if the property thus receipted, be cloined by the

debtor, or returned into his possession; and, on demand made by the officer having the execution, if he refuse to produce it, the officer may levy the execution on other property of the debtor, and for want thereof may lawfully commit him to prison on such execution. *Pierson* v. *Hovey et al.* 51

2 The levy of an execution on real estate is not within the statute to prevent fraudulent speculations & sales of choses in action, passed the 28th of October, 1807, and such levy is not rendered void by the possession of a third person, holding adversely to the debtor at the time of the levy. *Farnsworth* v. *Converse et al.* 139

3 If the judgment recited in an execution, as the judgment on which it issued, purport to have been entered up at one term, and the record produced to support such execution, be of a judgment entered up at another term, such execution is irregular, and all the proceedings had under it are void. *Ridder* v. *Alexander et al.* 267

4 If in a trustee action judgment be rendered both against the principal debtor and the trustee, and one execution issue on both judgments against the principal debtor and the trustee, such execution is irregular and void. *ib.*

5 In a case where personal property is attached on mesne process, if execution be taken out, and delivered to the same officer who served the attachment, within thirty days from the time final judgment was rendered in the suit, it is a taking of the property within the meaning of the 33d section of the judiciary act; and the property is not discharged from the attachment, although the execution be not actually levied on the property within thirty days. *Enos* v. *Brown.* 280

See AUDITA QUERELA.

F

FORGERY.

In an indictment for Forgery it is necessary to set forth the instrument charged as a Forgery in letters and figures, unless it be in the hands of the person charged with the Forgery, and in that case it is necessary to aver in the indictment that the instrument is in his possession. *State* v. *Parker.* 298

FOREIGN JUDGMENT.

1 A Judgment rendered by a Justice of the Peace in another State cannot be authenticated in the mode prescribed by the act of Congress; a Justice of the Peace, as such, having neither a clerk or a seal of his Court; nor is any other proof of such judgment required than the certificate of the Justice. *King administrator of Ingersoll* v. *Van Gilder.* 59

2 Such judgment is considered as a foreign judgment, is *prima facie* evidence of the debt, but the defendant may impeach it by showing that it was irregularly or unjustly obtained. *ib.*

FOREIGN LAWS.

See STATUTES OF OTHER STATES—*Deposition* 3.

FRAUDULENT CONVEYANCE.

No man can either in a Court of law or in a Court of equity set aside any of his contracts because

fraudulent on his part; nor can his heir set such contract aside, nor does his administrator, even in the case of an insolvent estate, so far represent the creditors that such contract can be set aside at his suit; but the creditors alone have a right to impeach and set aside such contract. *Peaslee administrator of Peaslee* v. *the administrator of Hay.* 331

G

GAOL BOND.

1 If a prisoner being principal in a bond for the liberties of the prison depart without being lawfully discharged, the sureties in the bond are entitled to no particular favour, but in every such case are equally liable with the principal. *Paine* v. *Ely et al.* 37

2 If the condition of a bond given for the admission of a prisoner to the liberties of the prison, contain any thing more than is provided by the statute, or materially vary from the condition prescribed, the bond is void. *Lyon* v. *Ide.* 46

3 If two or more debtors be committed to gaol on execution, and give a bond for the liberties of the prison, and the creditor discharge one of them from prison, whether before or after the other debtors have escaped from the prison, it is a discharge of the debt as to all. *Bailey* v. *Kimball et al.* 151

4 In an action by the assignee of a gaol bond against A. as principal and B. as surety, the defendants may plead a separate demand in favour of A. the principal in offset to the plaintiff's demand. *Brundridge* v. *Whitcomb et al.* 180

5 On the admission of a prisoner to the liberties of the prison who is confined under process from a Court of the United States, the bond must be taken to the Marshall of the District: If taken to the Sheriff of the County, it is void and no action can be maintained upon it. *Warren* v. *Russel.* 193

6 A special act of the Legislature freeing the body of a debtor from imprisonment, and providing that all such bonds as have been taken by the Sheriff on the admission of the debtor to the liberties of the prison be discharged, is not construed to extend to a case where the debtor had committed an escape from the liberties of the prison before the passing of the act. And if such act be so worded as to extend to such case, it is a law impairing the obligation of contracts, a violation of the Constitution of the United States, and void. *Starr* v. *Robinson.* 257

7 To an action on a gaol bond, nothing can be pleaded, which might have been pleaded to the original action, or which existed previous to the rendition of the judgment. *Allen* v. *Fisher et al.* 277

GOVERNOR'S RIGHTS.

The Governor's Rights, so called, being five hundred acres of land, granted or reserved to Benning Wentworth in each township in this State, granted by Benning Wentworth, Governor of the late province of New-Hampshire, are by the charters located and granted in severalty, in lieu of two shares. If, therefore, such lot or any part thereof be cut off by a prior grant, the owner of such lot has no right as the owner of two shares in common, to take a compensation out of other lands in the town, to make his quantity of land

equal to two shares, or to make up the quantity of five hundred acres. *Strong* v. *Paine.* 201

GLEBE LANDS.

The Selectmen of the several towns in this State, in which there is a Glebe Right, are empowered by statute to lease the lands belonging to such Right, reserving an annual rent; but have no authority to make any other conveyance of such lands. If, therefore, the Selectmen make a conveyance of such Glebe land in fee, the conveyance is void—neither conveying any title to the grantee, nor affecting the right of the town. *Bush* v. *Whitney.* 369

H

HALF BLOOD.

By the laws of this State, brothers and sisters of the half blood inherit real estate and take personal estate as next of kin to each other. *Brown et al.* v. *Brown.* 360

HUSBAND AND WIFE.

See Deed 7.

I

INDICTMENT.

1 An indictment or information charging that the respondent is a common cheat, and that he did by divers false pretences and false tokens deceive and defraud divers good citizens of this State, no particular fraudulent act being specified, is insufficient. *State* v. *Johnson.* 129

2 In an indictment for forgery it is necessary to set forth the instrument charged as a forgery in letters and figures, unless it be in the hands of the person charged with the forgery, and in that case it is necessary to aver in the indictment that the instrument is in his possession. *State* v. *Parker.* 298

INDEMNIFYING BOND.

See Bond 4.

INFANCY.

A promise of marriage made by an infant is void. *Pool* v. *Pratt.* 252

INNUENDO.

It is the office of an Innuendo in a declaration to explain what is before alleged, not to introduce any new matter; and if the matter before alleged be insufficient it cannot be aided by an innuendo. *Taft* v. *Howard.* 275

J

JUDGMENT.

1 A regular Judgment while it remain in force is conclusive as to every matter which might have been given in evidence or pleaded to the action, in which it was rendered, except that which must be pleaded in offset—the same principle obtains in case of a judgment by confession. *Barney* v. *Goff and Cady.* 304

2 If an action be commenced against a person not residing within this State, and the plaintiff without giving the defendant personal notice of the suit, take judgment at the first term, such judgment is

irregular and void. *Rider* v. *Alexander et al.* 267

JURISDICTION.

1 Particular jurisdictions derogating from the jurisdiction of the Courts of common law, are to be taken strictly, and cannot be extended farther than the statute, giving the jurisdiction, will warrant. *Paine* v. *Ely et al.* 37

2 The Supreme Court have not jurisdiction of an offence against the seventh section of the act directing the mode of election of the Governor, Lieut. Governor, Treasurer of the State, Councillors and Representatives—the penalty being given to the County Treasurer. *State* v. *Jewett.* 169

3 In a case where the damages are uncertain, if the sum found by the Jury be within the jurisdiction of a Justice of the Peace, the County Court is not thereby ousted of jurisdiction. *Gale* v. *Bonyea.* 208

4 The Supreme Court have not original jurisdiction of the offence of assault and battery. *State* v. *Campbell.* 218

5 The statute of 1821 takes from the jurisdiction of the County Court every action or suit made cognizable before a Justice of the Peace. —Held that if an action be bro't before the County Court on several notes, each of which is within the jurisdiction of a Justice of the Peace, yet if the aggregate amount of all the notes exceed his jurisdiction, such action is not made cognizable before a Justice of the Peace, and therefore the County Court have jurisdiction of it. *Keyes* v. *Weed.* 379

6 An action will be dismissed in any stage of it, if it be discovered that the Court have not jurisdiction of the subject matter of the action; but the Court will not, *on motion*, dismiss an action of Book Account on the ground that a part of the articles charged on the plaintiff's book are not proper articles of book charge, and which being deducted from the plaintiff's account, the claim will be reduced within the jurisdiction of a Justice of the Peace. *Chittenden* v. *Hurlbut.* 384

L

LANDLORD AND TENANT.

See EJECTMENT 7.

LAND TAX COLLECTOR.

See COLLECTOR of LAND TAXES.

LAWS OF THE OTHER STATES.

See DEPOSITION 4.

LIEN.

See EXECUTION 1, 5. ATTACHMENT 2.

LIMITATION OF ACTIONS.

1 The praying out of a writ is the commencement of an action, to save a demand from the statute of limitations, and not the service of the writ. *Allen* v. *Mann.* 94

2 The clause in the statute of limitations, limiting the time for bringing an action of debt, or *scire facias* on judgment to eight years, does not extend to a *scire facias* provided by the 9th section of the act directing the serving and levying executions, in a case where an execution has been levied on prop-

erty which did not belong to the debtor. *Baxter* v. *Tucker*. 353

See EJECTMENT 3.

M

MILITIA.

1 The statute requiring muster-rolls of militia companies to be made, is merely directory to officers; and if in any case it be omitted, this neglect of the officer will not excuse any one from the performance of military duty. *Mower* v. *Allen et al.* 381
2 If an order to warn a company to do military duty be made by the commanding officer, to A. B., sergeant, his warning is valid, altho' he be but a private. *ib.*
3 The law does not require a return on such order. *ib.*
4 Militia officers are by the statute constituted Courts of competent jurisdiction, and in imposing fines they act judicially—not ministerially. The party aggrieved by the decision of a commanding officer of a company may appeal to the regimental field officers, whose decision is conclusive, and can no more be called in question, collaterally, than the decision of any Court of a limited jurisdiction; the decisions of both are conclusive while acting within the limits of their jurisdiction. *ib.*
5 The law which requires a warrant to an orderly sergeant to be recorded, is merely directory; and if a record of the warrant be omitted, the authority of the orderly sergeant is not thereby affected. *ib.*

MERGER.

See MORTGAGE 2.

MORTGAGE.

1 A mortgagor can do no act which will affect the title of the mortgagee. *Ellithorp* v. *Dewing*. 141
2 On the 3d of March, 1817, A. executed a mortgage of his farm to B. to secure the payment of a debt due from A. to B. On the 15th of November, 1820, C., a creditor of A., commenced an action against A. and attached the same farm. On the 3d of February, 1821, the debt due from A. to B. secured by said mortgage remaining unpaid, A. executed a deed of warranty of the same farm to B. in full satisfaction of said debt. In June, 1821, C. recovered judgment in his suit against A.—prayed out execution, and levied the same on a part of the same farm.—Held that the execution of the deed by A. to B. was not a performance of the condition of the mortgage, but operated as a release of the equity of redemption, and that the title of B. under the mortgage was not merged in his title under the warranty deed, but that B. is to be considered as a *prior* and C. as a *subsequent* mortgagee. *Myers* v. *Bronell*. 448

N

NOTICE.

See DEED 1, 2, 3, 4, 6.

NOTICE *accompanying the Plea of the General Issue*—See PLEADINGS 5, 7.

NEW TRIAL.

1 The discovery of new evidence to prove an *alibi* of a witness, that he

was not at the place where he testified he was with the party when he heard a certain conversation, as it goes only to discredit the witness, and that in a matter merely circumstantial, is not of itself a sufficient ground for granting a new trial. *Campbell* v. *Hyde.* 65

2 Although the Court will not grant a new trial for any mistake in point of law which the Court may have made on the trial, if it appear that justice was done in the case, yet if it appear that evidence was improperly admitted, which the opposite party had no opportunity to contradict or explain, as the Court cannot ascertain whether justice has been done in the case, without assuming the province of the Jury a new trial will be granted. *Barney* v. *Goff and Cady.* 304

O

OFFSET.

1 If a defendant in an action on contract had before the commencement of the plaintiff's action, become liable to pay a demand against which the plaintiff was bound to indemnify him, yet, if the defendant had not paid the demand before the commencement of the action, he cannot plead it in offset. *Carpenter* v. *Coit.* 88

2 In an action by the assignee of a gaol bond against A. as principal and B, as surety, the defendants may plead a demand in favour of A., the principal, in offset to the plaintiff's demand. *Brundridge* v. *Whitcomb.* 180

OVERSEERS OF THE POOR.

1 Monies expended by the overseers of the poor in support of a pauper cannot be recovered of such pauper, without a special contract for repayment. *Bennington* v. *McGennes.* 44

2 An action of general *indebitatus assumpsit* for monies paid, laid out and expended, will not lie in favour of one town against another, to recover monies expended for the support of a pauper. The action, in such case, must be brought on the statute, stating a case within some one of its provisions. *Middlebury* v. *Hubbardton.* 205

P

PAUPER.

See OVERSEERS of the POOR 1, 2.

PAROL EVIDENCE.

1 Parol evidence cannot be admitted to explain proprietors' records, or to add what might have been omitted in making up such records. *Britton* v. *Lawrence et al.* 103

2 The recovery of a judgment in a Court of Record can in no case be proved by parol evidence. *Graham* v. *Gordon.* 115

3 A parol agreement cannot be admitted to add to or vary a contract in writing. *Jones* v. *B. and W. Webber.* 215

4 An action cannot be maintained on a note of hand which is in the following words—"For value received I promise to pay J. B. sixteen, the first day of May next, with interest;" parol evidence not being admissible to explain such patent ambiguity; but the payee must resort to the original contract, treating the note as a nullity. *Brown* v. *Bebee.* 227

5 In an action on a promissory note given by the defendant to the plain-

tiff, in satisfaction of an injury done the plaintiff, by the circulation of false reports injurious to the character of his wife, supposed to have been put in circulation by the defendant, parol evidence is admissible, to prove that at the time of giving the note, the plaintiff agreed that if the defendant would satisfy him the plaintiff, that he the defendant did not originate such reports he would give up the note to the defendant. *Saunders* v. *Howe.* 363

PART PERFORMANCE.

A case is not taken out of the statute of frauds by part performance, unless such part performance be made under such circumstances as to amount to a fraud in the opposite party, nor even then unless such part performance be expressly stated in the bill. *Meach* v. *Stone and Perry.* 182

PLEADINGS.

1 Great latitude is in many cases allowed in the admission of evidence under the general issue, but in case of special pleadings the parties are strictly confined to the facts put in issue; therefore, if the plaintiff traverse a plea in bar, he cannot give in evidence matter in avoidance of the plea, and can avail himself of such matter by a replication only. *Campbell* v. *Hyde.* 65

2 In an action of trespass against a town or parish collector, the defendant may, under the general issue, give in evidence his authority to take the property in question in justification; but cannot give in evidence a release or any matter which does not show the taking lawful. *Wilcox* v. *Sherwin.* 72

3 In a declaration on a contract for the payment of specifick articles payable at a particular time and place, it is not necessary to aver that the plaintiff was ready at time and place to receive the payment. *Carpenter* v. *Coit.* 88

4 The rules of Court do not permit either party to change his plea after an issue of fact has been joined in the case. *ib.*

5 The statute allowing special matter to be given in evidence under the general issue, dispenses with the form only—not the substance of a plea in bar; and it is necessary in the notice in such case to state the facts relied on as fully as in a plea in bar. *Bowdish* v. *Peckham.* 144

6 To an action on a promissory note a plea in bar that the note was given without consideration is insufficient, as it amounts to the general issue. *Potter* v. *Stanley.* 245

7 The statute allowing special matters to be given in evidence under the general issue, dispenses with the form only—not the substance of a plea in bar; and it is necessary in the notice to state the facts as particularly, though not with the same technical precision, as in a plea in bar. *Barney* v. *Goff and Cady.* 304

See Bond 5.

POWERS.

If A. B. and C. are impowered by act of the Legislature to issue their warrant for the collection of a tax, the power is joint, and must be executed by all; if two only sign the warrant, it is void. *Townsend* v. *Gray.* 127

PRISONER.

See GAOL BOND.

PROMISE OF MARRIAGE.

See INFANCY.

PROBATE COURT.

See ADMINISTRATION BOND.

PROMISSORY NOTES.

1 An action cannot be maintained on a promissory note, which is in the following words—"For value received I promise to pay J. B. sixteen the first day of May next with interest," parol proof not being admissible to explain such patent ambiguity, but the payee must resort to the original contract, treating the note as a nullity. *Brown* v. *Bebee*. 227

2 To an action on a promissory note a plea in bar that the note was given without consideration is insufficient, as it amounts to the general issue. *Potter* v. *Stanley*. 243

3 If a note not negotiable be sold and assigned by the payee to a third person, and notice of such transfer be given to the maker of the note, a subsequent payment of the note to the original payee by the maker, will not avail him, but he will be holden to pay the note to the assignee. *Newel* v. *Adams*. 346

4 H. executed his note of the following tenor:—"Arlington, September 27, 1818. For value received I promise to pay Luther Stone, Town Treasurer, or his successors in office, eighty-four dollars twenty-seven cents."—Held that the town of Arlington could maintain an action on the note against H. *Arlington* v. *Hinds*. 431

See ENDORSEE of a PROMISSORY NOTE.

PAROL EVIDENCE 5.

DECLARATION 4.

PROOF OF DEED.

See DEED 5.

PROPRIETORS' RECORDS.

1 If in the records of a proprietors' meeting, it be stated that the meeting was regularly warned and holden, it is not only *prima facie* evidence that such meeting was legally warned, but is also *prima facie* evidence that the different articles acted upon at said meeting were inserted in the warning. *Britton* v. *Lawrence et al.* 103

2 Parol evidence cannot be admitted to explain proprietors' records, or to add what might have been omitted in making up such records. *ib.*

3 If a plaintiff in ejectment rely on the proprietors' records to show the land in question severed to his right, he must show by the records that such severance was made agreeably to the statute regulating proprietors' meetings. *ib.*

PROPRIETARY DIVISION.

A person not being a proprietor in a town cannot be permitted to call in question the legality of a proprietary division of such town; nor will a proprietor be permitted to do so, unless it appear that his rights have been violated, nor even in that case if it appear that he has submitted and acquiesced in such division. *Wells et al.* v. *Brewster*. 147

See EJECTMENT 4, 8, 9.

Q

QUI TAM ACTION.

The person prosecuting a *qui tam* action may well be considered as the sole plaintiff; therefore a deposition taken to be used in such action is admissible and may be read in evidence, although in the caption the prosecutor be stated as the sole plaintiff, omitting the *qui tam*. *Dupy qui tam* v. *Wickwire*. 237

R

RECOGNIZANCE.

1 Magistrates have at common law no authority to take recognizances for the prosecution of suits: If, therefore, such recognizance be taken by a magistrate, not being authorized by statute to take it, it is void, and the suit will abate in all cases where the law requires security to be taken for prosecution. *Hiecock* v. *Hiecock*. 133

2 A power to take recognizances with any legal condition, is incident to every common law Court of record; therefore although the statute which authorizes the defendant, in certain cases, to file in Court a declaration on book against the plaintiff, provides that the defendant shall become recognized—yet if a third person in such case become recognized instead of the defendant, such recognizance is valid. *Young* v. *Shaw*. 224

3 If an appeal be entered from a judgment rendered by a County Court to the Supreme Court, and the appellee recover judgment in the Supreme Court, although for a less sum than he recovered in the County Court, it is an affirmance of the judgment of the County Court within the meaning of the condition of the recognizance for the prosecution of such appeal. *Page* v. *Johnson et al*. 338

4 It is not necessary for the appellee in such case to take out execution on the judgment, in order to charge the bail on the recognizance. *ib*.

5 In a declaration on such recognizance, it is necessary for the plaintiff to aver that the defendants have not answered or paid the intervening damages and costs. *ib*.

REFEREES.

1 If a report of referees be set aside by the County Court, no advantage can be taken of such report in any subsequent trial of the cause either in the County or Supreme Court. *Whitmore* v. *Rider*. 279

2 Whether a report of referees ought to be accepted or set aside, is a question wholly in the legal discretion of the Court to which it is made, and cannot be reversed by writ of error or otherwise. *ib*.

REGISTRY OF DEEDS.

See DEEDS 1, 2, 3, 4, 6.

REVIEW.

1 If either party after judgment in the County Court, enter a review of the cause to the next term of the County Court, the opposite party may, notwithstanding, enter an appeal of the same cause to the Supreme Court, and such appeal will be sustained. *Hubbard* v. *Leonard*. 216

REVISED LAWS.

1 In construing the revised laws of 1797, they are not to be considered as prior and subsequent acts, but as establishing a system of statute law—as parts of the same law. *Ashley* v. *Harrington.* 348

S

SALE OF CHATTELS.

See WARRANTY.

SCIRE FACIAS.

1 By a plea in bar to a *scire facias* against bail on mesne process, the defendant may avail himself of a release by the plaintiff of his debt against the principal, or a release to himself as bail; but cannot plead in bar that the plaintiff affirmed to him, that the debt against the principal was settled, as a release or discharge; and can avail himself of such affirmation, only by pleading that it was made fraudulently, and with intent to charge him wrongfully with the debt of the principal, and that he was thereby prevented from securing the principal in discharge of himself as bail. *Van Ness* v. *Fairchild.* 153

2 If an administration bond be prosecuted before the County Court, and a judgment rendered for the penal sum of the bond, a *scire facias* brought on such judgment by a creditor or other person interested in the estate, to recover the amount of his claim agreeably to the statute, must be brought before the same Court, notwithstanding such claim, as to the amount of the demand be within the jurisdiction of a Justice of the peace. *Hoit* v. *Bradley et al.* 262

4 A *scire facias* will not lie against a trustee, on his neglect or refusal to expose the goods and chattels of the principal debtor found in his hands, the remedy in such case is by motion to the Court as provided by statute. *Aldis* v. *Hull.* 309

4 In a writ of *scire facias* provided by the 9th section of the act directing the serving and levying of executions, in a case where an execution has been levied on property, which did not belong to the debtor, it is necessary for the plaintiff to aver, and on trial to prove, that the property on which the execution was levied did not belong to the debtor. *Baxter* v. *Tucker.* 353

SET-OFF.

See OFFSET.

SHERIFF.

1 A Sheriff or other officer has no legal authority to command assistance to keep a prisoner wantonly and from mere caprice. *Smith* v. *Joiner and Moore.* 62

2 The acts of a Deputy Sheriff are in law the acts of the Sheriff, and he alone can sue or be sued for any thing done in the execution of his office. *ib.*

3 *Assumpsit* will not lie against a Sheriff or other officer, for a misfeasance or non-feasance in the execution of the duties of his office. *Walbridge et al.* v. *Griswold.* 162

4 In an action against a Sheriff for not paying over monies by him collected on an execution, if he plead the general issue, with notice

that on the trial he will give in evidence that a third person had recovered judgment against him for the value of the property sold on the execution, without stating a prior right in such third person, such notice is insufficient. *Peaslee* v. *Stanniford.* 170

5 Such judgment is not conclusive against the plaintiff unless it appear that the plaintiff had notice of the suit against the Sheriff and had an opportunity to defend. *ib.*

6 In an action on an indemnifying bond given to the Sheriff by his Deputy, in assigning breaches of the condition, it is necessary to aver that the Deputy had been negligent in the performance of some official duty—that in consequence of such negligence, the Sheriff had become liable, and that the creditor, or person injured by such negligence, had commenced an action against the sheriff, and had recovered a certain sum for his damages and costs on account of such neglect of his Deputy. *Hyde* v. *Childs et al.* 230

7 In an action in favour of a Sheriff or other officer, on a receipt for property taken on mesne process, in which is a stipulation to return the property on demand, or pay all costs and damages, the value of the property receipted is the measure of damages. *Catlin* v. *Lowrey.* 396

See BAIL.

SPECIFICK ARTICLES.

See DECLARATION 3, 4.—TENDER 1, 2.

SPECIALTIES.

1 Specialties are not negotiable, and no action can be maintained on an instrument under seal in the name of an assignee. *Read* v. *Young.* 244

STATUTES OF OTHER STATES.

1 The Statutes of any one of the United States, if printed under the authority of such State, may be read in evidence in the Courts of this State. *State* v. *Stade.* 303

STATUTE OF FRAUDS.

1 If a Bill in Chancery be brought for a specifick performance of a contract for the sale of lands, the defendant may avail himself of the Statute of Frauds, either by plea or demurrer, unless in certain excepted cases appearing on the face of the bill. *Meach* v. *Stone and Perry.* 182

2 Such case is not taken out of the statute by part performance, unless such performance be made under such circumstances as to amount to a fraud against which a Court of Equity will relieve, nor even then unless such part performance be stated in the bill. *ib.*

SUPREME COURT.

See JURISDICTION.

SURVIVOR OF ACTION.

By the provisions of the 73d and 74th sections of the judiciary act of 1797, and 88th and 89th sections of the probate act of 1797, in case of the decease of a party defendant, pending a suit, the plaintiff, if the cause of action doth by law survive, is impowered to proceed to final judgment against the exe-

cutor or administrator, although the estate be represented and found insolvent. *Ashley* v. *Harrington.* 348

T

TENDER.

1 A tender of specifick articles by a debtor at time and place of payment is a discharge of the contract. The creditor cannot by neglecting to attend at time and place to receive the property, deprive the debtor of the privilege of discharging his contract. And a tender of specifick articles at the time and place appointed by the contract, may be made by the debtor to the creditor, *in his absence*, if he neglect to attend, and such tender will discharge the contract, *and vest the property of the articles tendered in the creditor. Barney* v. *Bliss et al.* 399

2 And as the law requires that the debtor do all in his power to perform, a plea that the debtor had the property ready at time and place, and there remained through the day, ready to deliver the same, but the creditor did not attend to receive it, and that the property is still ready for the creditor, if he will receive it, is insufficient. *ib.*

TOWN OFFICERS.

The appointment of Constables and other town officers must be shown by a copy of the record of their appointment from the Town Clerk, before their acts can be given in evidence. *Broughton* v. *Blackman et al.* 109

TOWN TREASURER.

See PROMISSORY NOTE 4.

TRESPASS.

See EVIDENCE 2.

TROVER.

If A. draw logs to the saw-mill of B. to be sawed on shares, and B. saw them and sell the whole of the boards, he is guilty of a tort, and an action of trover will lie in favour of A. against B. for his share of the boards. *Vickery* v. *Taft.*

TRUSTEE ACTION.

1 If in a trustee action, judgment be rendered both against the principal debtor and the trustee, and one execution issue on both judgments against the principal debtor and the trustee, such execution is irregular and void. *Rider* v. *Alexander et al.* 267

2 The act directing proceedings against absconding or concealed debtors provides that if execution shall issue against the goods and chattels of the principal debtor in the possession of the trustee or trustees, and a return be made by any proper officer on such execution, that such trustee or trustees neglected to expose such goods and chattels, or to pay the amount of such execution, if there be sufficient in his, her or their ands and possession, the Court shall on motion of the creditor, grant a rule to show cause, why execution should not issue on such judgment against such trustee or trustees, his, her or their proper goods and estate, and a *scire facias* cannot be substituted in the place of such motion, the

RULES

OF THE

SUPREME COURT

OF THE

STATE OF VERMONT,

AS A

COURT OF LAW,

AND A

COURT OF CHANCERY.

RULES IN CASES AT LAW.

FIRST.

Ordered, That all actions cognizable before this Court, shall be entered before the opening of the Court on the first day of the session thereof.

SECOND.

THAT all causes brought to this Court by appeal from any County Court, shall be heard, tried and determined upon the pleadings in the Court below; unless the party wishing to change his plea, shall give notice to the adverse party, in writing, of the alteration, amendment, or new plea, intended to be made, at the time of granting such appeal, or not less than thirty days before the session of the Court to which such appeal is taken.

THIRD.

THAT on entry of every writ of error, the plaintiff in error shall

deliver to the Court a fair copy of the writ of error, with the assignment of the errors, or the writ will be dismissed.—And whenever an issue of law is joined, the party demurring, shall furnish the Court with a fair Copy of all the pleadings in the cause on the first day of the term, if the issue is joined in the County Court, and if joined in this Court at the time of demurring, and on failure the other party may amend without terms.

FOURTH.

THAT all motions for the continuance of causes, shall be made on the first day of the sitting of the Court, founded on affidavit, in writing, of the person in whose favour the motion is made, or his attorney; which affidavit shall be lodged with the Clerk of our Court. And if the motion is founded on the absence of a witness, the affidavit shall state the name and place of residence of the witness and the substance of the testimony expected from him.

FIFTH.

THAT there shall be paid to the Clerk, for his use, on the filing of each affidavit for continuance, twenty-five cents—whose duty it shall be carefully to endorse the true day when the same was filed in Court, and to keep the same on file.

SIXTH.

THAT in all cases where an order has been made by the Court, or either of the Judges, for publication in any newspaper, it shall be the duty of the Clerk to inspect such publication, whose certificate that the same is made in pursuance of said order, shall be received by the Court as *prima facie* evidence that such order has been complied with, and the Clerk shall receive twenty-five cents as a fee for such inspection and certificate.

SEVENTH.

THAT whenever a party plaintiff shall enter a writ of error in this Court, he shall, on or before the second day of the term, file and lodge with the Clerk a full record of the judgment of the Court

below, on which such writ of error was founded, properly certified by the Clerk of said lower Court; and the same shall be kept for the information of this Court, and the inspection of the parties, or the writ will be dismissed.

EIGHTH.

THAT every case to be heard in this Court, in error, on demurrer, in arrest of judgment, on a case stated, case reserved, and on a motion for new trial, the counsel for each party shall, before the cause shall come on to be argued, make out and deliver to each of the Judges, a brief therein, fairly written, which shall contain the principal point or points intended to be relied on, distinctly and concisely noted and properly arranged, and the authorities to be produced, with fair and distinct references to the case, book, and page, or in case of failure the party in fault will not be heard in argument.

NINTH.

THAT whenever the guardians of any minor, idiot, lunatic, or distracted person, shall think it necessary to the support, or conducive to the interest of their ward, to sell and convey his real estate, and shall present his petition therefor to either Judge of the Supreme Court, such Judge may direct the substance of said petition and his citation thereon, to be published in such public newspaper as he shall judge will most probably give notice to all concerned, of the premises, for such number of weeks as he shall think proper, the last of which publications shall be at least sixty days before the session of the Court to which such petition shall be addressed, which shall be deemed sufficient notice to appear, and no licence to sell will be granted unless the petitioner shall file the affidavit of two credible witnesses showing the propriety of the sale, the value of the estate to be sold, and the responsibility of the persons executing the bond.

TENTH.

THAT every petition or motion for new trial, founded upon the discovery of new evidence, be accompanied with a statement of the

preceding trial and the evidence given upon that trial, so far as to show the applicability of the evidence relied upon as new discovered, and also with the affidavit of the party and witnesses.

ELEVENTH.

THAT all dilatory pleas in actions originally entered in this Court, shall be filed with the Clerk by the opening of the Court on the second day of the first term, to which the plaintiff shall reply on the opening of the Court the fourth day.

TWELFTH.

THAT in all actions, brought pursuant to the fifth proviso in the third section of the Judiciary Act, the defendant shall plead by the opening of the Court on the third day of the first term, to which plea the plaintiff shall reply by the opening of the Court on the fourth day of the term; and that, in all cases ni error, the defendant's plea shall be filed with the Clerk by the opening of the Court on the third day of the first term.

THIRTEENTH.

THAT in all other actions, all pleas shall be filed with the Clerk within thirty days after the first day of the first term.—Replications shall be filed within twenty days after the expiration of the said thirty days; and twenty days shall be allowed to each party for filing every succeeding plea, until the pleadings are closed; and each party shall file his plea with the Clerk, within the twenty days allowed to him for that purpose.

FOURTEENTH.

THAT in any trial at law, of an issue of fact, no witness shall be examined by more than one counsel on each side.

FIFTEENTH.

THAT all exceptions to any opinion of the Court on any trial of an issue of fact, shall be drawn up by the party excepting, and presented to the Court for allowance within forty-eight hours after the

verdict or other decision of issue of fact, and no exception will be allowed unless the point relied upon shall have been presented to the Court in writing, if to a decision of the Court, at the time of making such decision, and if to the charge, before the Jury shall have retired.

SIXTEENTH.

THAT no files, or other record of the Court, be suffered by the Clerk to be taken out of his office.

SEVENTEENTH.

THAT all depositions read on the trial of any cause, shall be lodged with the Clerk, and remain in his office subject to the inspection of both parties.

EIGHTEENTH.

THAT whenever a deposition is read on the trial of any cause without any exception to the caption or form of taking, no exception shall thereafter be taken to the caption or form of taking such deposition.

NINETEENTH.

REPORTS of auditors, referees, and road committees, shall be filed with the Clerk by the second day of the term, or the same will be postponed to the next term, and exceptions thereto together with the evidence relied upon shall be filed with the Clerk within two days after the report is filed, and a copy of the report, exceptions and testimony, shall, at the time of filing thereof be furnished the Court by the party excepting, or the report will be accepted.

TWENTIETH.

THE testimony of witnesses to be used for the purpose of obtaining a divorce shall be contained in depositions taken in the form required by the statute for taking depositions to be used in civil causes, omitting the reason or cause of taking.

RULES IN CASES IN CHANCERY.

FIRST.

Ordered, That the *subpœna* shall be signed by a Chancellor, and, with the bill, shall be served in the same manner as is directed by the Judiciary Act for the service of writs of summons.

SECOND.

THAT whenever any bill in Chancery against a person resident without this State shall be presented to a Judge of this Court, such Judge may make an order, either directing personal notice by a copy of such bill and order thereon, to be left with the respondent by some suitable indifferent person, whose return shall be verified by oath, or directing a publication of the substance of such bill and order in some publick newspaper, three weeks successively, the last of which publications shall not be less than four weeks before the session of the Court to which the respondent shall be cited to appear; either of which orders, made and complied with, shall be sufficient notice for the respondent to make answer to such bill.

THIRD.

THAT the complainant may amend his bill before answer, plea, or demurrer filed, furnishing the defendant with a copy of the bill as amended.

FOURTH.

THAT the defendant shall enter his appearance on the first day of the term in which he is required to appear, or the bill shall be taken as confessed.

FIFTH.

THAT no plea or demurrer to a bill shall be received, unless the same be filed with the Clerk, by the opening of the Court on the third day of the term in which the defendant is required to appear, or, if the bill be amended, within twelve days after copy furnished as required by the third rule.

SIXTH.

THAT the answer shall be filed with the Clerk within four weeks from the rising of the Court at which the defendant is required to appear, or the plea or demurrer shall have been decided, or the bill shall be taken as confessed, on the second day of the next succeeding term.

SEVENTH.

THAT the answer to a bill brought to foreclose the equity of redemption, shall be filed with the Clerk, and a copy thereof furnished the Court, by the defendant, on the third day of the term, at which he is required to appear; or an affidavit of the party, or counsel, shall be filed with the Clerk, disclosing facts constituting a substantial defence, and a copy thereof furnished the Court; otherwise the bill shall be taken as confessed.

EIGHTH.

THAT at the time of filing a plea or demurrer, the defendant shall set the same down for argument; or, in default, an order shall be entered that the same be overruled.

NINTH.

THAT the complainant shall except or reply to the answer, and file his exceptions or replication with the Clerk, or set down the cause for hearing on bill and answer within four weeks after the expiration of the time limited for filing the answer, the same having been seasonably filed, or a decree of dismissal shall be entered on the second day of the next succeeding term.

TENTH.

THAT exceptions to the answer, unless the defendant submits to answer further gratis, shall be referred to a master, whose report thereon shall be filed with the Clerk within four weeks after filing the exceptions, or the exceptions will be considered as waived; and if further answer is required by the report, it shall be filed with the Clerk within four weeks after the time limited for filing the re-

port, the same having been seasonably filed, and on failure, or if the amended answer is not conformable to the requisitions of the report, the bill shall be taken as confessed on the second day of the next succeeding term. The master will give six days notice, to the parties, of the time when he will hear the exceptions.

ELEVENTH.

THAT the complainant shall reply to the amended answer, and file his replication with the Clerk, or set down the case for hearing on bill and answer, within four weeks after the time limited for filing the amended answer, the same having been seasonably filed, or a decree of dismissal of the bill shall be entered on the second day of the next succeeding term.

TWELFTH.

THAT the testimony of all witnesses shall be taken, in writing, on oath, if residing within the State, by a master—if residing without the State, by an examiner appointed by the Court, or by a Chancellor; and all interrogatories and cross-interrogatories to witnesses, unless settled by counsel, shall, on application of either party, be prepared and settled by a master, and filed with the Clerk within four weeks after traverse filed. Six days notice shall be given the parties, by the master, of the time of settling the interrogatories; and the testimony shall be taken within four weeks from the time of settling and filing the interrogatories, the master or examiner giving six days notice thereof to the parties; and no witness, who has been once examined, and his testimony taken, shall be again examined, unless by consent of parties, or order of a Chancellor.

THIRTEENTH.

THAT all testimony, to be used in a cause, shall be filed with the Clerk, and publication pass, within four weeks from the experation of the time allowed for taking the testimony of the witnesses. On application to a Chancellor, and sufficient cause shewn, the time for taking and publishing testimony may be extended four weeks beyond the time herein limited.

FOURTEENTH.

THAT within four weeks after publication has passed, either party, objecting to the credit or competency of a witness, may take testimony, before a master or examiner, relative thereto—file with the Clerk and publish the same, the master or examiner giving to the adverse party six days notice of the time of taking such testimony.

FIFTEENTH.

THAT all bills in Chancery, hereafter to be brought, and all decrees for signature, shall be endorsed or signed by some solicitor of the Court, subscribed with his own hand at the foot of such bill, petition or decree, who shall be answerable for the propriety of the form and language of the same, and correctness of such decree; and no decree, in which are erasures or interlineations, will be signed, unless the same are noted at the foot of the decree and above the signature of the solicitor.

SIXTEENTH.

THAT no decree will be recorded by the Clerk, till the expiration of twenty days from the rising of the Court at which the same is made, and no decree will be suspended by a petition for rehearing, unless the same is served upon the adverse party within the said twenty days, nor unless a Chancellor shall certify thereon that the decree ought to be thereby suspended.

SEVENTEENTH.

THAT no injunction will issue to stay proceedings at law, in a case in which a verdict has been given or damages assessed, unless a sum of money equal to the amount of the debt or damages, as security therefor, shall have been deposited with the Clerk of this Court.

EIGHTEENTH.

THAT an injunction, issued by a single Chancellor, may, by such Chancellor, or any two Chancellors, be dissolved in their discretion; but in no case will such injunction be dissolved, unless the defendant, applying therefor, shall have filed with the Clerk his answer to the bill, and shall produce an attested copy thereof, and proof of his having notified the orator of the time when he will so apply to the Chanceller or Chancellors.

NINETEENTH.

THAT all exceptions to a master's report shall be filed with the Clerk, and a copy of the report and exceptions furnished the Court within twenty-four hours after filing the report and notice thereof.

TWENTIETH.

THAT all notices, required to be served upon the party, may in lieu thereof, be served upon the solicitor of record in the cause.

TWENTY-FIRST.

THAT all bills, answers, pleas, decrees, and copies, shall be fairly and legibly written, or the same will be rejected.

TWENTY-SECOND.

THAT the orator, in every suit in Chancery, shall deliver to the Court a fair copy of the bill, at the opening of the Court, on the second day of the term, and the defendant shall deliver to the Court a fair copy of his answer, plea, or demurrer, at the time of filing the same; and on failure of the orator the bill will be dismissed, and on failure of the defendant the bill will be taken as confessed.

TWENTY-THIRD.

THAT in every case to be heard in Chancery, on demurrer, on plea, on bill and answer, and on traverse of the answer, the counsel for each party shall, before the same shall come on to be heard, make out and deliver to each Judge, a brief therein, fairly written, to contain the point or points of law, equity, and fact intended to be relied on, distinctly and concisely noted and properly arranged; and under each the authorities to be produced, with fair distinct references to the case, book, and page, and, as far as shall depend on concession or proof, with distinct and concise references to the concession, document, and other proof in the cause; and in case of neglect, the party so neglecting will not be heard in argument.

TWENTY-FOURTH.

THAT the party, wishing the time extended beyond the time limited in any rule for the performance of any act or thing required by such rule, or to avoid any order or decree consequent upon his having neglected to comply with any rule, shall, before the expiration of such time as is appointed in the rules, in the former case, and

before the entry of such order or decree upon the docket, in the latter case, file his petition with the Clerk for that purpose in open Court, and give notice thereof, together with an affidavit setting forth the cause of such application, and furnish the Court with a copy of the same.

TWENTY-FIFTH.

THAT in case of neglect, and noncompliance with any rule, (excepting such as require copies for the Court) unless a petition and affidavit shall have been filed, as is required in the next preceding rule, the Clerk will enter (without special direction of the Court) upon the docket such order or decree as the party claiming the benefit of the rules for such neglect, is entitled to and shall direct; and in case of neglect to comply with any rule which requires copies to be furnished the Court, such rule will be enforced by special order of Court.

ADMISSION OF ATTORNIES AND SOLICITORS.

FIRST.

That hereafter, when any Attorney, who has been admitted to the County Court, and has practised with reputation therein, for three years, shall apply for admission as an Attorney of this Court, which application shall be made at the stated term of the Court in the County where such candidate resides, the Court, on the recommendation of the bar of such County, will appoint a committee of the members of such bar, to examine into the character and qualifications of such candidate; and if such committee find the candidate qualified, they shall recommend him to the Court for admission.

SECOND.

And whenever the Attorney applying for admission as aforesaid, shall wish to be admitted as solicitor in the Court of Chancery, it shall be the duty of the said committee, so appointed as aforesaid, to examine into the qualifications of the candidate, who shall be admitted by the Court, on the recommendation of such committee, in writing.

THIRD.

That when any Attorney of this Court shall apply for admission as solicitor in the Court of Chancery, on the recommendation of the

bar of the County in which he resides, the Court shall appoint a committee of such bar, to examine into the qualifications of such candidate, who shall be admitted on the recommendation of such committee, in writing.

FOURTH.

That no attorney or solicitor of this Court, shall enter bail in any suit or process which is or shall be pending in the Supreme Court or Court of Chancery.

The foregoing Rules are hereby established as the Rules of Practice in said Court; and all Rules heretofore established as the Rules of Practice therein are hereby repealed.

RICHARD SKINNER, *Chief Judge.*
JOEL DOOLITTLE, } *Assist. Judges.*
ASA AIKENS, }

Manchester, 15th of December, A. D. 1824.

AN ESSAY

On the Law of Contracts, for the payment of Specific Articles. By DANIEL CHIPMAN.

For sale by HORACE JANES, *St. Albans.*
E. & T. MILLS, *Burlington.*
E. P. WALTON, *Montpelier.*
WILLIAM FAY, *Rutland.*
CHAUNCEY GOODRICH, *Castleton.*
HOLBROOK & FESSENDEN, *Brattleborough.*
BLAKE, CUTLER & Co. *Bellows Falls.*
WILLIAM GOULD & Co. *Albany.*
G. M. DAVISON, *Saratoga Spr's.*
GOULD & BANKS, *New-York.*
O. D. COOK & SONS, *Hartford.*
CUMMINGS, HILLIARD & Co. *Boston.*
JOHN PRENTISS, *Keene.*

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT,

PREPARED AND PUBLISHED IN PURSUANCE OF A STATUTE LAW OF THE STATE.

BY DANIEL CHIPMAN.

VOL. II.

SECOND EDITION.

RUTLAND:
REPRINTED AND PUBLISHED BY GEO. A. TUTTLE & CO.
1860.

Justices of the Supreme Court, State of Vermont, during the time embraced in these Reports, from the year commencing October 1823, and ending October 1824.

Hon. RICHARD SKINNER, *Chief Justice.*

Hon. CHAS K. WILLIAMS,
Hon. ASA AIKENS, } *Assistant Judges.*

AN

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CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF THE
STATE OF VERMONT.

Curtis *vs.* Hubbel.

The plaintiff and the defendant were both heirs at law of the estate of E. C. and the plaintiff was administrator of said estate. The plaintiff delivered to the defendant certain articles of personal property belonging to the estate, valued at a certain sum, for which the defendant gave his receipt, by which he promised to account to the plaintiff for the said property on a settlement of said estate. In an action of *assumpsit* on said receipt — held that the plaintiff to support his action must show by the records of the Court of Probate a settlement of said estate.

Chittenden, January, 1824.

This was an action of *assumpsit* on a certain receipt in writing, for sundry articles of personal property, of the estate of E. Camp, valued at a specific sum, to be accounted for by the defendant to the plaintiff on a settlement of the estate.

On trial upon the general issue, it appeared in evidence, that the respective wives of the plaintiff and defendant were heirs at law of the estates of Luke Camp, and Elizabeth Camp, relict of said Luke; and that Luke Camp dying first, the plaintiff was appointed administrator *de bonis non* of his estate, Jan. 2, 1817, and that Elizabeth Camp having deceased in the mean time, he was also appointed administrator of *her* estate on the 7th of Jan. 1817. It also appeared that under an order of the Judge of Probate, the two estates were consolidated on the 4th of Aug. 1818.

A certified copy of the records of all the proceedings of the Probate Court, in relation to these estates, was produced on the trial, from which it also appeared that an inventory of Elizabeth Camp's estate, amounting to $580 25, was returned June

Chittenden, January, 1824.

Curtis. vs. Hubbel

2d, 1818 — that an order for the sale of the real estate of Elizabeth Camp, for the payment of debts, was obtained by the plaintiff Aug. 4th, 1818 — a return of the sale made on the 7th Dec. 1819, and the plaintiff's account as administrator allowed on the same day.

The Court instructed the Jury that this record was sufficient evidence of the settlement of the estate, so as to entitle the plaintiff to a return of the articles receipted, on notice thereof and demand; and the Jury returned a verdict for the plaintiff accordingly.

And now upon a motion to set aside the verdict and grant a new trial, founded upon exceptions to the opinion of the Court, it was contended by the counsel for the defendant, that it does not appear, from an inspection of the whole record, that the plaintiff, in his settlement, has accounted for all the real or personal estate of Luke Camp — That having procured from the Judge of Probate an order consolidating both estates, he is bound to show a final and complete settlement of both; for, without such showing, the true situation of neither can appear: and the allowance of an account of an administrator is no evidence of a final settlement of the estate, unless it shall appear from the same, that all the property inventoried, both real and personal, has been accounted for.

By the Court. It is obvious from the relative situation of these parties and the tenor of the receipt, that it was their expectation at the time of its execution, that this amount at least, of the estate of Elizabeth Camp, would remain for the defendant in right of his wife, on a final settlement of the estate; and, in such event, an acknowledgment of the receipt of so much, as heir, would have been a sufficient accounting for the property specified and estimated in the receipt. The settlement contemplated in the receipt was such an one as that the respective right of the parties could be ascertained and determined by it. The plaintiff did thereby take upon himself to effect such a settlement as that the defendant could ascertain from it wherefore the goods were demanded before the plaintiff would have a right to demand them; And it must be confessed that upon an inspection of the whole records relating to these estates, (which are very voluminous) such a settlement does not appear.

Chittenden, January, 1824.

Curtis vs. Hubbel.

The consolidation of the two estates was an improvident act; for the surplus of the one was not liable to be taken to eke out the insolvency of the other: besides, the whole of the estate of Luke Camp, not otherwise accounted for, does not satisfactorily appear, from the records offered, to have gone into the consolidation. The plaintiff has thereby rendered it impossible for him to show, at least by this record, how the estate of Elizabeth Camp, stands on settlement, or indeed whether it is settled at all. The instruction to the Jury therefore, as to these records, was incorrect; and the verdict is, for that cause, set aside, and a new trial granted.

Charles Adams attorney for the plaintiff.

Griswold and *Follet* for the defendant.

Lowrey *vs.* Barney and Read.

In Error.

If a Sheriff admit a prisoner to the liberties of the prison in a case not provided for by law, he is guilty of an escape; and if he take a bond to indemnify himself against such escape, such bond is void.

Chittenden, January, 1824.

THIS cause came up on a writ of error from the County Court for the County of Chittenden. Heman Lowrey, Sheriff of the County of Chittenden, commenced an action of debt on a gaol bond against William Barney and Ebenezer Read, before a Justice of the Peace, which came to said County Court by appeal.

The declaration was in the common form, to which, the defendants in the court below pleaded in bar, (admitting the commitment of the said William Barney, his admission to the liberties of the prison, and the execution of the bond on that occasion, by the defendants, as set forth in the plaintiff's declaration) that the said William Barney remained within the liberties of said prison, and did not depart therefrom until having taken the oath provided by the act relating to gaols and gaolers, and for the relief of persons imprisoned therein, he was by a Court of gaol delivery legally discharged from his said imprisonment, setting forth the proceedings of the Court of gaol delivery in due and legal form.

Chittenden, January, 1824.

Lowrey vs. Barney and Read.

To which plea in bar the plaintiff replied, that although true it is that the said William Barney was discharged from prison and did depart therefrom, in the manner set forth in the said plea in bar; yet the said execution in the said plea in bar mentioned, and on which the said Barney was committed, was not issued on a judgment rendered in a proper action of debt, covenant, contract or promise; or for costs on abatement, nonsuit, discontinuance, or demurrer according to the statute in such cases made and provided; but the said execution issued upon a judgment rendered upon an *audita querela*, for the damages and costs set forth in the plaintiff's declaration.

To which replication the defendants demurred; and the Court below rendered judgment for the defendants; to reverse which the plaintiff brought this writ of error, which at the present term came on to be heard on the plea *There is no Error*.

Thompson and *Richardson* for the plaintiff.

In any view which can be taken of this case, the gaol bond is valid, and obligatory upon the defendants, and the plaintiff is entitled to judgment upon it.

1.—The Clerk who issued the execution, not having certified the nature of the action, in which the judgment was rendered, it appeared upon the face of it to be a case in which the sheriff was bound to admit the prisoner to the liberties of the prison. The Sheriff was by law not only authorized, but compelled to take the bond, or to admit the prisoner to the liberties without indemnity.

2.—Barney and Read having entered into this bond voluntarily cannot excuse themselves from the penalty, by the proceedings of the Court of goal delivery, for as that Court had no jurisdiction of the case, their proceedings are void.

3.—The creditor in the execution must have a remedy somewhere; and clearly he cannot have a remedy against the Sheriff. He was necessarily governed by the face of the execution, and could not be answerable for the proceedings of the Court of gaol delivery. And he can have no remedy against the Clerk who signed the execution, because it does not appear to be a case

in which the law required him to insert in the execution the nature of the action in which the judgment was rendered.

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Griswold and *Follet* for the defendants.

In support of the judgment rendered by the court below, the defendants contended

1.—The plaintiff in error, who acted in his official capacity of Sheriff of the County of Chittenden, was not authorized by law to admit the defendant Barney to the liberties of the prison, on the execution described in the plaintiff's declaration.

The statute provides that any person imprisoned and in gaol upon an execution founded on a proper action of debt, covenant, contract or promise, shall be admitted to the gaol-yard — such prisoner first giving bond to the Sheriff, &c.

From the plaintiff's declaration it appears, that the execution on which Barney was committed was not founded on a proper action of debt, covenant, contract or promise. The Sheriff, then, was not authorized by law to admit Barney to the liberties of the prison, or to take the bond in question, but was guilty of an escape in suffering Barney to go at large. Stat. Vol. I. 233.

2.—Whenever a Sheriff permits a voluntary escape of a person confined for debt, he cannot legally retake him; and if he do retake him, he is liable to an action of false imprisonment. 2 T. R. 172. 5 *idem* 40. 2 Bac. 240.

The object of imprisonment for debt is to compel the debtor to make satisfaction of the debt to the creditor. If then the Sheriff either bail a prisoner in a case where he is not bailable, or suffer him to go at large, though with a keeper, for ever so short a time, it is an escape. 2 Bac. 237. A bond or other security taken in such case, to save the Sheriff harmless is void. 5 Coke 101 — 102.

3.—If however it be considered that the Sheriff was authorized by law to take the bond in question, and that it was a good and legal security to him against the escape of Barney; yet we insist that the plaintiff is barred of his remedy on the bond by the discharge of Barney by the Court of gaol delivery as set forth in the pleadings.

The 40th section of the act relating to gaols and gaolers, and for the relief of persons imprisoned therein, provides for the discharge of all persons imprisoned by virtue of any execution

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issued on a judgment rendered in a proper action of debt, covenant, contract or promise; or for costs recovered on abatement, nonsuit, discontinuance or demurrer. There is a striking similarity in the phraseology of this and that of the 11th section of the same act, which provides for the admission of prisoners to the liberties of the prison. It is evident that the Legislature intended to extend the privilege of the poor debtor's oath to all bailable cases; and a literal construction of the act would carry it still further; for it is expressly provided, that the prisoners may be admitted to the poor debtor's oath, when committed for costs in certain cases; and it is at least doubtful whether the Sheriff could lawfully admit such prisoners to the liberties of the prison.

It is conceived that no case can be shown, where a prisoner has been denied the poor debtor's oath, if entitled to the liberties of the prison.

On no principle then, can the Sheriff be entitled to recover on this bond; if Barney was not entitled to the liberties of the prison, the bond we have seen is void; if he was entitled to the liberties of the prison, the bond is valid, and the discharge by the Court of gaol delivery equally so.

AIKENS J. delivered the opinion of the Court.

The errors assigned are, That the declaration and replication of the plaintiff were adjudged to be insufficient in law, and that the defendants recover of the plaintiff their costs.

In order to determine the sufficiency of the declaration, it becomes necessary to enquire whether it sets forth such a bond as the Sheriff was, by law, authorized to take. For a gaol bond, being a creature of the State, if it is taken in a case where none by law can be received, it is necessarily void, and no sufficient declaration can be predicated upon it.

This declaration describes the bond as having been given upon the admission of a debtor to the liberties of the prison, in a case where the debtor stood committed upon an execution, issued upon a judgment rendered against him, on *audita querela*, at the suit of one Moses Benedict, for ten cents damages and for $14 95 costs of suit. The only statute then in force giving authority to the Sheriff to take a gaol bond, which can have any bearing upon this case, (it not being a judgment for costs simply)

is the 10th section of the act relating to gaols and gaolers, passed March 9th, 1797, which provides in substance, that any person imprisoned in gaol upon execution, founded on a proper action of debt, covenant, contract or promise, shall be admitted to the liberties of the gaol yard; such prisoner first giving bond to the Sheriff, &c.

An *audita querela* is not a proper action of debt, covenant, contract or promise; for it does not lie to enforce the payment or to recover damages for the non-performance of either. It is described by Blackstone in his Commentaries, and in 2 Coke 29, as being an action in the nature of a suit in equity. It is rather an equitable action in the nature of trespass, by which the complainant seeks to be relieved from some oppressive injustice, brought under color of legal process by the complainee, and to recover the damages consequent thereon. It is not a case within the statute. The bond therefore was void, and the Sheriff guilty of voluntary escape in admitting the defendant, Barney, to the liberties of the prison.

But if the law were otherwise on this point, the judgment of the County Court must, nevertheless, be affirmed; for by the 12th section of the same act, authority is given to a Court of gaol delivery, to discharge a prisoner, on being admitted to the poor debtor's oath in *all cases*, where by the 10th section, the Sheriff is empowered to admit him to bail; in which case the defendant's plea in bar must necessarily avail them.

It has been urged in argument for the plaintiff in error, that inasmuch as the nature of the action in which the judgment was rendered was not inserted in the execution, the Sheriff was bound to admit to the liberties, and accept of the bond. But it does not follow that because the Legislature have directed the authorities issuing executions, to insert therein the nature of the actions, in certain specified cases, the Sheriff is authorized to admit to the liberties, in all other cases. Previous to the act of 31st January, 1804, the Sheriff was left to ascertain the nature of the action, in all cases, in such manner as he could. It is indeed to be regretted, that since the Legislature have attempted to remedy that inconvenience, the provision does not extend to every case within it.

It has also been attempted to sustain this action on the ground that the bond was a *voluntary* bond, and therefore binding. But

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this is impossible. To give it validity on that ground, would be placing it in the power of the Sheriff to admit his prisoner to bail in all cases.

The judgment of the County Court is therefore affirmed.

Court of Probate — WILSON and WHITE, prosecutors.

vs.

KEELER and WOOSTER.

If an Administrator *de bonis non* neglect to make an inventory of all the estate of the deceased, real and personal, which remained unadministered by the former Administrator, and return the same to the Court of Probate within the time limited by the Court, is a breach of the condition of his bond.

If such Administrator neglect to settle the account of his administration within the time limited, it is a breach of the condition of the administration bond — nor will a settlement of the account of his administration, after the commencement of a suit on the administration bond, after judgment therein by *nil dicit*, for the penal sum, save the condition, or bar the action on the bond.

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THIS was an action of debt on an administration bond executed by Elijah Keeler and Lyman Wooster, on granting to the said Keeler letters of administration *de bonis non* on the estate of Charles McNiel, deceased.

The declaration, after setting forth the bond with the condition in common form, proceeded to assign breeches of the condition as follows:—"Now the said Court of Probate for the District of Chittenden saith, that after the execution of the writing obligatory aforesaid, to wit, on the 1st day of March, 1818, at Charlotte in the County of Chittenden, aforesaid, goods, chattels, rights, credits and estate, which were of the said Charles McNeil, not administered, to the amount of eight thousand dollars, came to the hands and possession of the said Elijah Keeler, administrator *de bonis non* as aforesaid; and that the said Elijah Keeler, administrator *de bonis non* as aforesaid, has not exhibited or caused to be exhitbited, into the registry of the Court of Probate for said District of Chittenden, any inventory of the goods, chattels, rights, credits and estate which were of the said Charles McNeil deceased, not administered or of any other goods, chattels, rights, credits or estate, which were of the said Charles Mc

Neil deceased, although the time set and limited in the condition of the said writing obligatory, for exhibiting or causing to be exhibited such inventory has long since elapsed, and that the said Elijah Keeler has not made or caused to be made any account of his administration, of the goods, chattels, rights credits and estate, which were of the said Charles McNeil deceased, according to the condition annexed to the said writing obligatory, although the time set and limited in and by said condition for so doing has long since elapsed; but has neglected and refused to render unto the said Court of Probate for the District of Chittenden any account of his administration, although he the said Elijah Keeler was afterwards, to wit, on the 27th day of June, 1820, at Burlington, in said District of Chittenden, by the Honorable Jabez Penniman, then Judge of Probate for said District, ordered and directed to make and render to said Judge of the Court of Probate aforesaid an account of his administration as aforesaid; and has wasted the goods, chattels, rights credits and estates which were of the said deceased.

And the said Court of Probate for the District of Chittenden further saith, that on the 5th day of April, 1811, at Charlotte, in said District of Chittenden, Erasmus Towner, Francis Brakenridge, and Wm. Williams, Commissioners duly appointed by the said Court of Probate to examine and adjust the claims of the creditors of the said Charles McNeil deceased, represented insolvent, among other creditors of said estate, found due and allowed to James Wilson, late of Quebec in the Province of Lower Canada, now of Danville in the County of Caledonia and State of Vermont, Peter S. Robinson, late of Quebec aforesaid now deceased, and James White of Paisley in Scotland in the Kingdom of Great Britian, then merchants in company, under the firm of Wilson, Robinson & Co. they being creditors of said estate, the sum of $856, from the estate of the said Charles McNeil deceased. Which said allowance of said Commissioners, was afterwards, to wit, on the 7th day of May, 1811, and in the life time of the said Peter S. Robinson, at Jericho, in said District of Chittenden, returned to and accepted and allowed by the Court of Probate for said District, as by the records of said Court of Probate, ready to be produced here in Court may appear. And the said James Wilson, Peter S Robinson, and James White, in

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the life time of the said Robinson, and the said Wilson and White since the decease of the said Robinson, have been injured and prevented from receiving payment of their said debt, so found due and allowed to them as aforesaid, by reason of the non-performance by the said Elijah Keeler, of the condition annexed to said writing obligatory as aforesaid, and their said debt remains due and unpaid. And so the said Court of Probate for the District of Chittenden saith, that the condition annexed to said writing obligatory has been broken and the penalty thereof become absolute. By reason whereof, and by force of the statute in such case made and provided, an action hath accrued to said Court of Probate, &c.

This cause having been brought to this Court by appeal from the County Court, at the present term of this Court, after judgment by verdict for the penal sum of said bond, and after the said Wilson and White were entered as prosecutors of said action, the defendants filed in Court the following plea in bar:—"And now the said defendants, after judgment for the penal sum of the bond by *nil dicit*, and after the entry of the said Wilson and White as prosecutors, say, that the said Wilson and White from having any execution against them for any supposed damages set forth in said declaration, ought to be barred, because they say, that previous to the appointment of the said Elijah Keeler as administrator *de bonis non* of the estate of the said Charles McNiel deceased, and before the execution of the said writing obligatory, set forth in the plaintiff's declaration, an inventory of all and singular the goods, chattels and estate which were of the said Charles McNiel deceased, had been made and returned to said Court of Probate. And that before the appointment of the said Elijah Keeler as administrator *de bonis non* as aforesaid, the whole amount of the personal estate of the said Charles McNiel had been accounted for to the said Court of Probate by the then administrators, and by a decree of said Court of Probate on the 21st day of April, 1815, the same was duly settled in said Probate office, and the balance then in the hands of the said administrator, divided among the several creditors to said estate. That at the time when the said Elijah Keeler was appointed administrator *de bonis non* as aforesaid, no personal estate remained, and none ever came into the hands or possession of the said Elijah Keeler as such administrator; and nothing re-

mained appertaining to said estate, except three hundred acres of land, and the said land was by virtue of an order of said Court of Probate disposed of, and a return thereof regularly made to said Court of Probate, and by said Court accepted, as by the records of said Court in said Court remaining will appear.

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And the defendants further say, that afterwards, to wit, on the 18th day of November, 1823, at a Court of Probate holden at Williston in and for said District of Chittenden, the account of the said Elijah Keeler as administrator as aforesaid was duly adjusted and settled, and a balance of $840 34 then found due from the said Elijah Keeler as administrator; and the said Court of Probate then and there decreed, that the said balance of $840 34 should be divided among the several creditors to said estate, amounting to a dividend of 12 cents on the dollar, as by the records of said Court of Probate may more fully appear. And the said defendants aver that the said Elijah Keeler, administrator as aforesaid, has ever been and still is ready to pay the said dividend of 12 cents on the dollar to the creditors to said estate, and the same is now ready for the said Wilson and White if they will receive the same; all which, these defendants are ready to verify, &c.

To this plea there was a demurrer and joinder.

A. Foot for the plaintiffs.

Adams for the defendants.

AIKENS J. delivered the opinion of the Court.

The question for the decision of the Court is the sufficiency of the defendant's plea in bar. It appears by the pleadings that Keeler was appointed administrator *de bonis non* of the goods and estate of Charles McNiel deceased, on the third day of February, 1818, and that the bond on which the present suit was brought was dated the same day. By the condition of the bond, Keeler was bound to make and return an inventory of the goods and estate not administered by the first Tuesday of May, 1818, and to render an account of his administration by the first Tuesday of February, 1819. The plea does not aver a performance of either of these conditions. And the want of personal estate is no excuse for not returning an inventory of the real estate which it is admitted

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came into the hands of Keeler as administrator. Real estate being by statute subjected to the payment of debts in the hands of the administrator, it is material that he should inventory it; and the fact that it was inventoried, by a former administrator, cannot excuse the succeeding administrator. The inventory by the first administrator is no evidence that the property came into the hands of the administrator *de bonis non*; for it may have been sold, and the avails administered or wasted by the first administrator, and he cannot be permitted to resort to that as a shield, which he would not be bound to recognise as evidence against him.

It has been already decided by this Court in the case of Matthews Judge of Probate *v.* Page and Henshaw, (Bray. 106) that the neglect of an administrator to render an account of his administration is a breach of the condition of his bond, for which a creditor may prosecute. Indeed this is the case with every neglect of duty which materially affects the right of creditors. And no duty of an anministrator more materially affects the creditor than a return of the inventory and a settlement of the administrator's account; for when fairly rendered they are conclusive upon him.

The subsequent settlement with the Probate Court on the 18th of November, 1823, being after the liability incurred, and after action brought, and judgment therein by *nil dicit* for the penalty, cannot avail the defendants in bar. The plea in bar is therefore insufficient, and

Judgment must be rendered for the plaintiffs.

ARTHURTON and JONES *vs.* DURKEE.

In Error.

A mistake in the assessment of damages, not apparent from the record, whether the cause was tried by the Court or Jury, cannot be assigned for error.

Chittenden, January, 1824.

THIS cause came up on a writ of error from the County Court for the County of Chittenden. Jirah Durkee brought an action of *assumpsit* in the Court below, against Samuel Arthurton, and Nathaniel Jones, on a note or contract in writing, in the words follow-

ing:—"For value received we promise to pay and deliver to Jirah Durkee at the rafting place below Onion River Falls, by the first day of May next, one thousand pieces of clear stuff white pine plank, of the following description: to be thirteen and one half feet long, from one and three eights to one and a half inches thick, from ten to twelve inches wide, square edged and sound. Also one thousand pieces of good merchantable sound white pine plank of the same dimensions as above described for thickness, width and length, and all to be stubbed, butted and culled, suitable for the Troy market, and be delivered as aforesaid."

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Arthurton and Jones pleaded the general issue, which by agreement of parties was tried by the Court. The issue was found for Durkee, the plaintiff below, and damages assessed at $277 95; to reverse which judgment Arthurton and Jones brought this writ of error, in which is the following assignment of error: "And the said Samuel and Nathaniel say, that in the proceedings aforesaid, and in the rendition of the judgment aforesaid, there is error in fact, in this to wit, it appears by the proceedings aforesaid that said one thousand peices of plank, mentioned in said note or agreement, were estimated at eighteen thousand six hundred and ninety-two feet in board measure; whereas the said Samuel and Nathaniel say that the said one thousand pieces estimated in board measure will amount to only fourteen thousand four hundred and sixty-eight feet and three-fourths of a foot; making a difference between the actual amount and the amount in damages, as they were cast, of three thousand two hundred and twenty-three feet and one fourth. The said Samuel and Nathaniel further say, that the said Jirah has added the sum of $20 58 for interest, whereas they say that the said contract does not carry interest, and that no interest was allowed by the Court, but erroneously added by the plaintiff in making up the damages.

Adams for the plaintiffs in error.

Griswold and *Follett* for the defendant. They cited 6 Mass. R. 272. 7 Mass. R. 448. 8 *id.* 383.

AIKENS, J. delivered the opinion of the Court.

Error from the County to the Supreme Court lies only upon matter of law, arising upon the face of the proceedings, as certified

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to us by the copy of the record. The errors assigned, in this case, do not appear in the process, or record of the judgment, which this writ is brought to reverse. They are errors in fact, appearing only from the *averment* of the party, and being unsupported by the record cannot be recognised by this Court.

The plaintiffs in error, if the facts alleged by them be true, have mistaken their remedy. They should either by motion at the same term, or by petition at a subsequent term have sought a new trial in the County Court, where the mistake intervened; which, by the act of the 8th November, 1797, that Court is empowered to grant, in all cases within its jurisdiction, according to the usages of law, except for a difference of opinion, as to matters of fact, between the Court and the Jury who tried the cause.

The judgment of the County Court is therefore affirmed.

TRUMAN CHITTENDEN *vs.* GUY CATLIN.

In Error.

In an action of debt on a recognizance for the prosecution of an appeal from the judgment of a Justice of the Peace, it is not necessary to set forth in the declaration a transcript of the record of the proceedings before the Justice; but it is sufficient to set forth the proceedings with a *taliter processum fuit*. Nor is it necessary, in such case, for the party claiming the appeal to become recognized for the prosecution of the appeal, if sufficient security be given by way of recognizance entered into by others.

Chittenden, January, 1824.

THIS cause came up on a writ of error from the County Court for the County of Chittenden. Catlin brought an action of debt on recognizance in the Court below *v.* Chittenden, in which he declared, "That heretofore, to wit, on the 23d day of January, 1817, the said Guy Catlin had instituted a process against Giles T. Chittenden then in life, since deceased, to compel the said Giles to acknowledge a certain deed by him executed to the said Guy Catlin, of certain lands and tenements in the town of Burlington; which process was then pending before David Russell, Esq. Justice of the Peace for the County of Chittenden. And the execution of said deed being then and there duly proved before the said Justice, the

said Guy Catlin by the consideration of said Justice recovered judgment in his favor against the said Giles T. Chittenden—that said deed was duly proved; and that he the said Guy recovered of the said Giles T. his costs, in and about the proving of said deed sustained, taxed at $16 80. And the said Giles then and there prayed for an appeal from said judgment, to the County Court then next to be holden at Burlington, &c.—which appeal was allowed by said Justice; and, on that occasion, the said Truman Chittenden personally appeared before said David Russell, Justice of the Peace, as aforesaid, and acknowledged himself indebted to the said Guy Catlin in the sum of $500 00, to be levied of his goods and chattels, lands and tenements, and for want thereof on his body, if default should be made in the condition following to wit, that he the said Giles T. Chittenden should prosecute his said appeal to effect, and answer and pay all intervening damages, occasioned to the said Guy Catlin, by reason of his being charged with additional costs in case judgment should be affirmed; as by the records thereof before the said Justice remaining, and by a transcript thereof ready to be produced in Court, may more fully appear. And the said Giles T. Chittenden having duly entered his said appeal in said County Court, such proceedings were had thereon, that at the term of said Court holden at Burlington within and for the County of Chittenden on the last Monday of February, 1819, and in the life time of the said Giles T. Chittenden, the said Guy Catlin by the consideration of said Court, recovered judgment against the said Giles on his process aforesaid—that on the 23d day of February, 1819, being the second day of said term, A. B. personally appeared, and in open Court, after being carefully examined and duly cautioned and sworn, made solemn oath, that he saw Giles T. Chittenden voluntarily sign and seal the said deed and deliver the same to the said Guy Catlin at Quebec, on the 14th day of August, 1816, and that he the said A. B. subscribed his name thereto as a witness, and that C. D. the other subscribing witness subscribed his name thereto at the same time in his presence, and thereupon the said Court did allow the said deed to be recorded. And the said Court did further adjudge that the said Guy Catlin recover of the said Giles T. Chittenden his costs, taxed at $26 48; all which by the files and records of said County Court and here

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ready in Court to be shown will more fully appear. And the said Guy Catlin avers, that the said Giles T. Chittenden in his life time wholly failed and neglected to pay to him the said Guy his costs aforesaid; and that the said Truman Chittenden, since the decease of the said Giles has wholly failed and neglected to pay and discharge the same. And the said judgment still remains in full force, not reversed, set aside, or in any manner paid or satisfied; whereby an action hath accrued to the said Guy Catlin to demand and recover of the said Truman Chittenden the said sum of $500 00, &c."

To this declaration there was a general demurrer in the Court below, and judgment for the plaintiff: to reverse which judgment, the defendant below brought this writ of error; assigning for error, that said declaration was insufficient, and assigning also the general error.

Adams for the plaintiff in error.

Robinson for the defendant.

AIKENS J. delivered the opinion of the Court.

The error specially assigned in this case, and that on which the plaintiff relies, is that the County Court erred in deciding that the declaration and the matters therein contained, were sufficient in law for the said Guy Catlin to have and maintain his said action against the said Truman Chittenden.

In support of the error relied on, it has been urged by the plaintiff in error—1st, That there is no such process known in the law as is set forth in the declaration; and that, therefore, all the proceedings upon it were *coram non judice*. And that the proceedings before the Justice, being not of common law jurisdiction, ought to have been set forth in the declaration at large, that it might have been seen whether the Justice was acting within the limits of his authority.

By a recurrence to the 7th section of the statute regulating conveyances, 1 Vol. Stat. 191, it will be seen that the statute not only authorizes such a proceeding, but expressly denominates it (with what propriety it is not now to be determined) as it is denominated in the declaration, a process to compel the acknowledgement of a deed. There is no necessity for greater strictness in pleading in

this than in every other case predicated upon a record. In every such case it is material that the facts should be pleaded with a *prout patet per recordum.* If the Justice has acted within his jurisdiction, it is to be taken advantage of on oyer. It would be not merely unnecessary but inconvenient and highly improper to fill up the declaration with a transcript of the whole proceedings in the case.

2.—It is insisted, that, as it does not appear from the declaration that the party claiming the appeal was recognized with the plaintiff in error for the prosecution of the appeal, the declaration is for that cause, fatally defective. The words of the statute are "the party claiming the appeal, first becoming recognised with sufficient surety, in such sum as the Justice shall direct to the adverse party, to prosecute his appeal to effect, as is by law directed in civil cases." But the law directing the taking of recognizances for the prosecution of appeals in civil cases (1 Vol. Stat. 53) is in its terms, as imperative upon the party to enter into the recognizance as in the clause above cited. That statute has received a construction which is not now to be shaken, and which must govern in this case. To give it the construction contended for, would be to stick in the letter, to the prejudice of appellants, without the possibility of any advantage to appellees. The judgment of the County Court is therefore affirmed; and this Court further adjudge to the defendant in error interest on the judgment below, as damages for the delay and single costs.

Bennington,
May,
1824.

DODGE *vs.* BILLINGS.

Billings agreed with Dodge to transport a quantity of goods from St. Johns to New-York, and gave him the following letter of instuctions:—"Sir, you will receive of mine, seven packages of merchandise, now in James Watson's store in St. Johns, and forward them to New York, to Robbins & Frost, flour merchants. You will enter them in Vermont District, and pay the expenses and secure the duties, which sums I will stand accountable to you for. You will forward the amount of all the expenses into New York, and duties, by letter, to the above firm, and make them subject to my order only—they are to be got along as cheap as possible."

In an action of *assumpsit* by Dodge *v.* Billings for the duties on the goods—held that to support the action, the plaintiff must prove the entry of the goods at the Custom House and the delivery of them in New York.

Billings gave Dodge the following receipt:—"Received of D. Dodge 275 in a Government Bill of Exchange to account for on notes I hold against him."

In an action of *assumpsit* on this receipt—held that parol evidence was admissible on the part of the defendant to prove that the amount of the receipt was by the agreement of the parties at the time the receipt was given, to be accounted for and applied on certain notes which Billings held in favor of one Copp v. Dodge.

THIS was an action of *assumpsit* for money had and received, and for money paid, &c

On trial of this cause at February term, 1823, upon the general issue, the Court directed a nonsuit, with liberty to the plaintiff to move to set it aside, on the following statement of the case:

On trial the plaintiff claimed the amount of $536 76, for duties paid on goods, entered by the plaintiff for the defendant at the Custom-House in Vermont District, in pursuance of directions of the defendant contained in the following letter:—

"*Montreal, July*, 7, 1817.

"Mr. D. C. Dodge, Sir, you will receive, of mine, seven packages of merchandize, now in James Watson's store, St. Johns, and forward them to New-York to Robbins & Frost, flour merchants. You will enter them in Vermont District, and pay the expenses, and secure the duties, which sums I will stand accountable to you for. You will forward the amount of all expenses into New York, and duties, by letter, to the above firm, and make them subject to my order only—they are to be got along as cheap as possible.

"OEL BILLINGS."

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Dodge vs. Billings.

Whereupon the Court decided that the plaintiff could not recover for said duties without proving the entry of said goods at the said Custom-House, and that that could only be proved by the minutes of the entry themselves, if they could be proved, or else by showing that the parties had liquidated the same and agreed upon the amount.

The Court also decided that the plaintiff was not entitled to recover the amount of said duties, until he had shown that the goods had been delivered in the city of New-York, and to the order of the defendant, in pursuance of his said letter of instructions.

The Court also decided that the following receipt—"St. Armonds, November, 9, 1814, Received of D. C. Dodge, by Horace Dodge, two-hundred and seventy-five pounds in a Government Bill of Exchange, to account for at the rate they are going at the above date, on notes I hold against him, Oel Billings"—of itself furnishes no cause of action; and that it was incumbent on the plaintiff to show that the notes against him on which this receipt was to apply, had been paid by the plaintiff, without the application of the sum contained in the receipt. The plaintiff then produced a receipt from the defendant in full of all demands, dated the 24th day of September, 1815, to show the paymenf of said notes, without the application of the said first mentioned receipt.

The Court also decided, that parol evidence was admissible to show that it was agreed at the time said first mentioned receipt was given, that said receipt was to be accounted for on demands that one William W. Copp held against the plaintiff, and then in the hands of the defendant as agent for Copp, and not on demands that said defendant held against the plaintiff on his own account; and that the defendant might show that at the time of giving said receipt, the defendant was acting as agent for said Copp, and gave the same as such agent.

The defendant on trial produced a receipt from the plaintiff, dated the 26th day of September, 1815, in full of all demands up to that date, to do away the effect of which, the plaintiff introduced Guy Catlin as a witness, who testificd that in the month of August, 1820, Oel Billings told him that the receipt whereon the plaintiff seeks a recovery was not included in the settlement with Dan C. Dodge in September, 1815, but was excepted out of it, and that

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another man ought to account to said Dodge for said receipt, which he understood to be the said Copp.

Jacob Collamer, on the part of the defendant, testified that he was present at a conversation between Oel Billings and Guy Catlin, in August, 1820, and that he understood the said Billings to say that the receipt on which the plaintiff claims a recovery was not included in the settlement made with Dodge in September, 1815—that he, the defendant, was not to account for the receipt, but that the same was given on account of said Copp, who had accounted to said Dodge for it.

Whereupon the Court decided, that the whole declaration of said Billings was to go to the Jury, and to be taken together, and have equal weight, unless there were circumstances or evidence tending to detract from the weight of one part of it more than the other.

The plaintiff filed a motion to set aside the nonsuit and for a new trial, on which the cause was heard at February term, 1824.

Bennet for the plaintiff.

The plaintiff is entitled to have the nonsuit set aside on the following grounds :—

1.—It was in no way essential to prove the entry of the goods by the Collector. The *gist* of this item of the plaintiff's claim is the payment of the duties by Dodge. He might have paid the duties, and an omission of the entry upon the books of the Custom-House. That is altogether a matter between the Collector and the Government.

1.—If necessary to prove the entry, the decision of the Court requiring the minutes of the entry themselves to be produced, if they could be produced, is believed to be incorrect. The minutes of the entry are no matter of record, and if produced, would de no evidence in the cause. They could only be used to refresh the memory of the collector. 3 Vol. U. S. L. p. 155, sec. 21. 4 Dallas 415.

3.—If the minutes of the entry were evidence, and the *best* evidence of the fact, yet the rule of law requiring the best evidence of a fact is dispensed with where the fact is drawn *collaterally* in question, as in this case. 1 Phi. Evi. 168. Anth. N. P. 40, 41, 191.

4.—As to that point of the decision requiring the goods to be

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delivered in the city of New-York, before a recovery can be had for the duties, we think it wrong. Dodge's action accrued upon the payment of the duties. The delivery of the goods in New-York, was by no fair construction of the letter of instructions a condition precedent, neither can such condition impliedly arise out of the transaction. Besides Dodge has a lien upon the goods until paid or tendered his disbursements.

5.—The receipt given in evidence by the plaintiff to support the special count, furnishes evidence of a contract, and gives a right of action *per se.* It acknowledges the receipt of a certain sum, and promises to account for, that is, pay it in a particular way. This receipt is very different in its legal operation from one which acknowledges the receipt of a sum of money on some *specific* demand. In the latter case, no action, it is admitted, can be sustained. The application, in the eye of the law, is already made—the claim upon which it was made extinguished. No promise can be raised to account for it, even though the original demand may be paid a second time.

6.—No parol evidence can be admitted to vary or contradict *this receipt* on contract.

It is admitted to be the law in England, in the State of New-York, and by the modern decisions, in this State, that receipts may be contradicted by parol; they are treated as exceptions to the general rule. But in all those cases the receipt furnishes evidence of the admission of a fact simply; and not of a contract. It is like the cases where a bill of lading states goods to have been shipped in *good order*, still the master who signed it, may show by *parol* that they were damaged.

In the 3d John. R. 319, M'Shinstry *v.* Pearsall, is a question much like the present. A receipt is given in evidence in these words: "Received of Capt. E. Smith 50 barrels of provisions *for account* of David M'Shinstry.—Robert Pearsall." Parol evidence was offered, to give an operation to this receipt, and admitted. Spencer J. who delivered the opinion of the Court, says:—"If the receipt had been in terms more explicit than it is, it would have been open to explanation—I mean that kind of explanation not directly contradictory to, but consistent with it." Here the Court treat this receipt as a contract, and apply the same principle in this respect, which is applicable to other contracts. It had long before

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been well settled in that State, that receipts, strictly speaking, might be even contradicted by *parol*.

The evidence admitted by the Court directly contradicted the written evidence, inasmuch as it changed the parties to the receipt, making it the receipt of Copp. 11 Mass. R. 35, 54.

On these points we think the plaintiff entitled to a new trial, however it may be as to the other points in the case.

Everett for the defendant.

The case does not state that any evidence was offered, and admitted or rejected by the Court, but that the Court decided certain abstract principles: the effect is to give to the party excepting an advantage, which a full statement of the case would not give him. The case should have stated what evidence the party offered, so that the Court might see whether it is within the principle decided, and whether the party has been injured by the decision. But we will examine the exceptions as they appear in the case.

1.—That the Court decided, that it was necessary for the plaintiff to prove an entry of the goods at the Custom-House.

The contract was not to pay the amount of duties chargeable upon the goods if entered, but to pay the duties on the entry. It was not contemplated that the plaintiff might smuggle the goods, and then claim for duties saved, as for duties paid. As, therefore, there could be no claim for the duties, if there was no entry of the goods, proof of the entry was indispensable.

2.—The second exception is to the decision of the Court, that the entry could be proved only by the minutes of the entry from the books of the Custom-House, or by showing that the parties had liquidated the sum and agreed on the amount.

This was the best evidence of the fact to be proved, and was, therefore, required by the general rule. But in this case it was peculiarly important to the rights of the parties, that this evidence should be produced. How could the goods be otherwise identified, or the amount of duties ascertained? But the plaintiff did not offer evidence of any kind to prove the entry of the goods, going on the ground that it was unnecessary to prove the fact in any way. This exception, therefore, does not belong to the case, and is to be laid wholly out of it.

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3.—The third exception is to the decision of the Court, that it was necessary for the plaintiff to prove the delivery of the goods in New-York agreeably to the terms of the contract, before he could call on the defendant for the amount of the duties.

The delivery of the goods in New-York was expressly made a condition precedent. The language of the letter of instructions is clear—"If you will take the goods, enter them, secure the duties, forward them to Robbins and Frost in New-York, and place them in their hands subject to my order, I will be accountable to you for the duties."

The plaintiff clearly had no lien on the goods as a carrier: for this was waived by the express terms of the contract—the goods were to be delivered in New-York, and the plaintiff was to be paid in Montreal, where both parties then resided.

It follows that the exceptions taken to the decision of the Court, in relation to the plaintiff's claim for duties paid on the goods, are wholly destitute of foundation; and it remains only to examine briefly the exceptions taken to the decision of the Court, in relation to the plaintiff's claim on the receipt for the Bill of Exchange.

It is obvious that the receipt *per se* furnishes no ground or cause of action—it contains no promise to pay, but to account for the sum specified on notes which the defendant held against the plaintiff. The plaintiff it seems was aware of this, and in order to entitle himself to recover, produced a receipt which the defendant had subsequently given him in full of all demands, to show that the notes on which the receipt was to be applied had been paid, otherwise, and no application of the receipt made. This furnished no evidence how all demands were paid; and when the plaintiff produced the defendant's receipt of the same tenor and date, a settlement simply between the parties was proved.

The defendant then offered parol evidence to prove that at the time that he, the defendant, gave the plaintiff the receipt for the Bill of Exchange, it was agreed and understood between the parties, that said receipt was to be accounted for on demands which one William Copp held against the plaintiff, then in the hands of the defendant, as agent for Copp. This evidence was admitted by the Court; and in any view which can be taken of the question was correctly admitted. The evidence did not contradict the re-

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ceipt, nor vary the tenor of it. The amount of the receipt was to be accounted for on demands which the defendant *held* against the plaintiff—not on demands in the name, or in favor of the defendant. The receipt then, in its literal meaning, applied as clearly to the demands which the defendant held in favor of Copp as to demands in favor of the defendant.

But parol evidence is admissible to vary the tenor of a receipt. 3 John. 316. 5 *id.* 68. But it is immaterial whether the decision of the Court was or was not correct; for the defendant did not avail himself of the decision—he produced no evidence in consequence of it. Beside, the exception taken to this decision is rendered immaterial by the plaintiff's receipt: for this is as good evidence of a discharge of the plaintiff's claim, as the defendant's receipt is of a discharge of the defendant's demands against the plaintiff. But to do away the effect of this discharge or receipt, the plaintiff introduced evidence of the confession of the defendant that the receipt for the Bill of Exchange was not included in the settlement of 1815, and the confession proved was that the receipt was not included in the settlement of 1815, because it belonged to Copp to settle it, and he had settled it. The Court decided that this confession should be taken altogether. This decision is supported by numerous authorites. Phil. Ev. 79, 80. 3 John. 427, Carver *v.* Tray. 10 *id.* 38, Fenn *v.* Lewis—*id.* 365, Audit *v.* Brown. 18 John. 227, Smith *v.* Ives. 5 Taunt. 92, Bunn *v.* Chandler.

AIKENS J. delivered the opinion of the Court.

This case comes before the Court on a motion for a new trial, filed by leave of the Court, after a nonsuit on trial at the February term, 1823, and is founded upon exceptions taken to certain opinions of the Court expressed on that trial, and which appear in a case made.

A motion for a new trial is an application addressed to the legal discretion of the Court. It is a call upon the Court to reconsider and reverse a judicial opinion, upon some fact shewn or offered to be shewn, which has deprived the applicant of some advantage to which the fact would legally entitle him. It is indispensably necessary, for the due exercise of this discretion, in relation to the rejection of testimony on trial, that it should appear, that testimony was *offered*, and what the testimony *was*, so far as to shew its material-

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ity and tendency to prove the issue: For otherwise, the Court would run great hazard of doing an injustice to the opposite party, and, at the same time, of rendering no benefit to the applicant himself. I will illustrate this idea by an hypothetical case. Suppose an affiliated bastard in Court, claiming title as heir to his putative father, under the statute of the 29th Oct. 1822, and the question to be, whether affiliated or not—that to prove that fact, he should offer in evidence a certified copy of the instrument of affiliation under the seal of the Probate Court. An objection should be taken to the evidence, on the ground that the original ought to be produced, and the court should, for that cause, reject it,—that, on the exception coming up, I should be of opinion that a certified copy *was* legal evidence; but on looking into the case, I should perceive that the instrument was witnessed by only *two* witnesses, whereas the statute requires *three*. Now it is quite clear, that, if the opinion had come up in the shape of an abstract proposition, and I had proceeded to act upon it, I should not only have done an injustice to the defendant, but a very *ill* service to the plaintiff. It is no answer to this objection, to say that the Court volunteered an opinion so broad as to render the offer hopeless. It is true it would be mere form for the purposes of *that* trial, but not so for the purpose of enabling the Court to judge of the propriety of another. Nor can it be said that the Court are presumed to *know* the facts from having tried the cause; for, in this government, the presumption is too often contradicted by fact, to warrant any such rule. If a party, from wrong advice or other cause, keep back material testimony in his power, and a verdict pass against him, the law will not indulge him with a new trial, though his cause may be ever so just, because of the vexation to the opposite party So where the error is in the Court, after a verdict, or nonsuit on trial, the plaintiff must shew by his case, that he has been deprived of the use of existing facts which make at least a good *prima facie* cause of action, before the Court can permit him to call further on the defendant. It is not sufficient that the exception shew that a set of facts, which by possibility may exist, and which would amount to a good *prima facie* case, have been excluded by the opinion. It must appear that the party had the *proof* of their existence in his power, and has been actually deprived of it by the decision; but this can be no

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otherwise done, than by such an offer of it on the trial, as will enable the party to have them certified up in his case. Indeed there is the same reason and the same necessity for this rule, on a motion to set aside a nonsuit, that there is for the rule, that a party petitioning for a new trial on the ground of newly discovered testimony, should shew to the Court the nature, extent, and pertinency of the testimony discovered.

It will be but a waste of time therefore, to discuss the merits of the first and second exceptions contained in the case.

It does not appear from the case but that all the testimony was admitted by the Court, which was offered by the plaintiff: And the remaining exceptions are taken to opinions upon the testimony admitted.

The plaintiff's specification contains two items.

The letter of instructions, of the 7th July, 1817, is the only evidence which I am enabled to perceive, from the case, to have been offered in support of the first item. This letter, without the existence of other proofs, (which is left to conjecture) does not amount to a *prima facie* cause of action.

The third exception is to the opinion of the Court, in relation to the legal effect and operation of the receipt, for a Government Bill, dated the 9th November, 1814, which is the foundation of the plaintiff's second specification. That opinion is, no doubt, correct. It is supported both by reason and the authorities.

The fourth is to the opinion, that parol evidence was admissible to show that the notes mentioned in that receipt, on which the defendant agreed to account, were notes in favor of one Copp, and then in the hands of the defendant, as the agent of Copp. I see nothing in this evidence, inconsistent with the very terms of the receipt itself. The expressions are, "*to account for on notes I hold against him.*" It is *not* that clear, explicit, and unambiguous thing which the plaintiff contends. The object to which the accountability is confined, is as little defined as possible. The word "*hold*" does not necessarily imply an ownership of the thing holden, and might, without violence to language, be adopted by an agent or consignee, as well as by an owner. And if the property of the notes, holden by the agent at the date of the receipt, was not in him, he necessarily held them *as agent*, if he held them lawfully.

If the defendant did not on that occasion hold notes against the plaintiff, in his own right, (of which there is certainly a possibility) any other decision might have done great injustice to the plaintiff himself. For the defendant made himself accountable for the avails of the bill in no other way, than by an application thereof *on notes* which he held against the plaintiff. This opinion is therefore unexceptionable.

The next evidence offered by the plaintiff was the receipt from the defendant, dated September 24th, 1815, in full of all demands of every name or nature to that date: Whereupon the defendant gave in evidence a like receipt from the plaintiff to him, of even tenor and date.

These two receipts, interchangeably executed, are proof of a final settlement between these parties, on the 24th September 1815, and a mutual release and discharge of all demands, of whatever name or nature, existing between them, to that date. This last mentioned receipt necessarily amounts to a full discharge, to the defendant from the receipt of the 9th November, 1814, (if, as the plaintiff contends, it was his own matter)—unless it was competent for the plaintiff to *contradict* the clear and necessary import of his own discharge, by *parol* testimony. This is indeed questionable; tho' it appears from the case, that the Court *did* permit him to make the attempt.

The fifth and last exception is to the opinion of the Court, in relation to the testimony of the declarations of the defendant.

There can be no doubt as to the law on this point: and there is as little doubt, but that the decision of the Court was in strict conformity to it.

The motion is denied.

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NOBLE *vs.* Administrator of JEWETT.

In Error.

The judgment of a County Court rendered upon the trial of an issue of fact, by agreement of parties, is conclusive, and the evidence on which the issue was found cannot be re-examined on a writ of error.

THIS was a writ of error brought to reverse a judgment rendered by the County Court for the County of Bennington, upon the trial of an issue of fact, joined to the Court by agreement of parties.

Church for the plaintiff in error.

Blackmer and *Hall* for the defendant.

SKINNER, Ch. J. delivered the opinion of the Court.

The record in this case shews, that an action of debt was instituted by the administrator of Erastus Jewett, deceased, for the recovery of the balance found due by the Commissioners on the estate of the deceased, from Josiah E. Noble (the plaintiff in error) upon an adjustment of the mutual claims of the said Noble and the deceased. Noble (the defendant below) pleads in bar, that he was not a creditor to the estate—that he did not exhibit any claim to the Commissioners for allowance—that the finding and allowance of the claim by the Commissioners in favor of the estate, was not in offset to any claim exhibited by him. These facts are traversed by the plaintiffs below, and issue, by agreement of the parties, is joined to the Court; and, after hearing, weighing, and considering the testimony, judgment is thereon rendered for the plaintiffs. To this record is appended a history of the testimony given on the trial of the issue, and the same is sanctioned by the Judges' signature.

The Court is not called upon to decide any question arising upon the declaration or pleadings; the parties admit their sufficiency. The only question material to be decided is, Can this Court reverse a judgment rendered by an inferior Court, upon the trial of an issue of fact by the agreement of the parties? The County Court are obliged by the statute, if the parties agree, to perform the duties of a Jury; they hear the testimony of the witnesses—decide upon the degree of credit to be given to them—weigh presumptions, &c., and find the issue. The same result must follow, as if the judgment

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was rendered upon the verdict of a Jury; and no other remedy can be had, than such as might be had in that case. Nothing can be more clear, than if the Jury had found a verdict for the plaintiff, and judgment had been rendered thereon, it would have been conclusive. No history or statement of *evidence* sanctioned by the Court or Jury would have laid the foundation for a writ of error. The case bears no analogy to a special verdict, in which *facts* are found, and upon which the Court is to pronounce the law. Upon the *facts*, which appear in *evidence* on the trial, no writ of error will lie; nor can the party, by stating them in a bill of exceptions, lay the foundation of a writ of error, so as to revise a decision upon a question of fact. Such statement allowed by the Court is irregular, and constitutes no part of the record. Of the law, in this case, the Court have no doubt; and it is presumed our peculiar system of trying questions of fact by the Court induced the party to prefer this writ.

The only way, in which a party can secure himself against a decision not warranted by the evidence, in this state is, by placing the issue to the Jury, and demurring to the evidence. If an issue of fact is tried by the Court, and the judgment is against the weight of evidence, the law affords no redress. If the issue is tried by the Jury, and the verdict is against the weight of evidence, the statute forbids a new trial. The judgment of the County Court, in this case, therefore, is affirmed with interest thereon as damages; and single costs only are allowed.

WRIGHT *qui tam vs.* ELDRED.

If two joint creditors commence an action *qui tam* as being the party aggrieved, to recover the penalty given by statute against fraudulent conveyances, and pending the action one of the plaintiffs die, the action survives to the surviving plaintiff,

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THIS action was originally commenced in the name of Solomon Wright and Elijah Lovett, who, as the party aggrieved, prosecuted, as well for the Treasurer of the County of Bennington, as for themselves, to recover the penalty given by the statute, alleging in

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their declaration, that one Mumfred Eldred was indebted to them in the sum of $1500 on note, and that the defendant was a party to a certain fraudulent judgment had and rendered with intent to defeat and avoid said debt.

Since the commencement of the suit, Lovett, one of the plaintiffs, deceased; and the defendant moved the Court to abate the suit, on the ground that the action did not survive to Wright, the surviving plaintiff; on which motion the cause now came on to be heard.

D. Chipman and *Merril* for the defendant.

Where matter appears on record, which shews the suit abated, it is not necessary to plead it, but the suit will be abated on motion. 11 Mass. R. 56. 3 Bac. 218. If Wright had not suggested the death of Lovett on the record, the defendant must then have pleaded his death in abatement.

The only question then is, Does this action survive to Wright, the surviving plaintiff? At common law, all suits abate by the death of the plaintiff or defendant, and also by the death of either one of the plaintiffs or defendants. 3 Bac. 218. By statute no suit shall abate by the death of the plaintiff or defendant, where the cause of action doth by law survive; that is, where the executor or administrator might prosecute, or be made chargeable. Ham. P. A. 48. It is also provided by statute, that if one of two or more plaintiffs, or one of two or more defendants die pending the suit, it shall not abate, if the cause of action doth by law survive to the plaintiff, or against the surviving defendant. Chit. Pl. 55. The statute of this state is in substance a copy of the several British statutes.

If the cause of action do not by law survive to the executor or administrator, in case of the death of a sole plaintiff, it cannot survive to one plaintiff on the death of the other. Ham. P. A. 226. 4 Mass. R. 475, Woodward *v.* Scofield. In this case the cause of action does not survive, as it arises wholly *ex delicto*, the action being founded on a penal statute.

The debt stated in the declaration to have been due from Mumfred Eldred to Wright and Lovett, and of which they alleged they had been defrauded by the defendant, entitled Wright and Lovett, as the party aggrieved, to recover the penalty. This was a joint

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right, and was done away by the death of Lovett, and is not changed into a right in favor of the survivor; and any other creditor of Mumfred Eldred is now entitled to sue for the penalty.

In all cases where the cause of action survives to a surviving plaintiff, it is the right to prosecute only, which survives, not the right of property; and in every such case where the money is recovered, the representative of the deceased plaintiff is entitled to contribution. In this case it is not pretended that the cause of action can survive to the executor or administrator, or that the representative of Lovett will be entitled to contribution in case of a recovery; and no case can be shown where it has been held, that the cause of action survived to a surviving plaintiff, which could not survive to the representative of the deceased.

This action is not brought to recover the debt alleged to be due from Mumfred Eldred to Wright and Lovett, nor is it otherwise material to show the existence of that debt, than to show that Wright and Lovett were creditors of Mumfred Eldred, and as such entitled to maintain the action upon the statute, as the party aggrieved. And if the penalty be recovered in this case, it will in no manner affect this debt—it will remain due as before. When Wright and Lovett commenced this suit, they acquired a joint right to the penalty—each to a moiety, when recovered; but if this action survive to Wright, he will be entitled to the whole penalty; for we have seen that the representative of Lovett cannot call on him for a contribution. It is not then the right of prosecution which, it is insisted, survives; but the right of property—to all intents the *jus accresendi*. No authority can be produced for this kind of survivorship.. The reason is, that the same rule has obtained in case of the death of one of the plaintiffs in an action, as in case of the death of a sole plaintiff—the same cause of action survives in the one case as in the other: The action does not in either case survive, unless the cause of action survive, to the representatives of the deceased. And if in any case the absence of authority in support of a rule of law, is evidence that the rule does not exist, it is most clearly so in this case; for cases of this kind must have frequently occurred.

Bennet for the plaintiff.—This action survives to Solomon Wright, it is contended, on the following grounds:

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If the cause of action survive by statute, *this action*, will survive. The cause of action on the note in favor of Wright and Lovett against Mumfred Eldred most clearly survives to Wright; it being a joint right in the life-time of both; and it would be strange indeed, if an injury to that right should not follow the right itself. In the present case, Wright and Lovett had only a joint right against the defendant, Caleb Eldred; and if there is no survivorship, Wright is remediless.

It is a general rule that where two are entitled to a right *ex delicto*, and one dies, it remains wholly to the survivor. Ham. P. A. 48.

In Connecticut, it has been decided, that the husband and wife *must* join in a *qui tam* suit, to recover the penalty for a fraudulent conveyance to defeat their joint right, on the ground that the *qui tam* action would survive to her, inasmuch as the debt or duty attempted to be avoided would survive to her. 3 Con. 324.

Again, had Lovett been the only promissee in the note, the *qui tam* action would have survived to his executors or administrators. The English statute upon survivorship extends to all cases of injury which have lessened the assets of the deceased —1 Chit. Pl. 56, 57—whatever may be the form of action. Our statute is to have the same construction.

The statute under which this action is brought, is a remedial and cumulative statute, so far as the rights of the plaintiff are concerned. The suit is wholly a civil one, and the County Treasurer has no control over it. No one has the action but the party aggrieved, and the intention of the statute is to give him satisfaction. Ham. P. A. 39.

SKINNER Ch. J. delivered the opinion of the Court.

It is urged by the defendant's counsel, that as at common law the death of one of two or more plaintiffs abated a suit, as well as the death of a sole plaintiff, the same consequences followed the death of one joint plaintiff as the death of a sole plaintiff—that the statutes in this State and in England, made to remedy the evil by authorizing the executor to prosecute the suit commenced by his testator, and the survivor to prosecute a suit commenced by him and another, since deceased, have the same object in view, and

extend alike to the same class of cases—that no action will survive to the survivor in case of the death of one of two or more plaintiffs, which would not survive to the executor upon the death of a sole plaintiff—that this suit would not survive to the executor, consequently it will not survive to the survivor—that the statutes made to prevent the abatement of suits give no new rights, nor do they keep alive that which at common law was determined.

It is a maxim of the common law, that personal actions die with the person; and that actions *ex delicto* can never be revived or prosecuted by the executor. Actions *ex contractu* abate by the death of the plaintiff, yet the cause of action remains, and the executor may prosecute thereon. Where there were two or more plaintiffs, the same doctrine seems to have obtained as to the abatement of the suit on the death of one; but the right to prosecute by the survivor existed, as well in cases arising *ex delicto*, as those arising *ex contractu*. By statute in England it is now provided, that if the plaintiff die *after interlocutory* and before *final* judgment, if the *action* might have been originally prosecuted by the executor, it shall not abate; and also if one of two or more plaintiffs dies, if the *cause* of action survives to the survivor, the suit shall not abate. By statute in England the executor may have an action for trespass done to his testator as of the goods and chattels of the deceased carried away in his life-time. By our statute it is provided, if the plaintiff die *pending* the suit, if the *cause* of action survives to the executor, the suit shall not abate; and also, if one of two or more plaintiffs die, if the *cause* of action survives, the suit shall not abate Our statute also gives to the executor an action for trespass done to his testator as of the goods and chattels of the deceased, carried away in his life-time.

The whole current of authorities requires a distinction at common law between the rights which survived to the executor, and the rights which survived to the survivor, although actions would alike abate in both cases. In actions *ex delicto*, in case of the decease of the sole plaintiff, not only did the suit abate, but the right was forever gone. Not so in case of the decease of one of two or more plaintiffs; the suit abated, but the right survived. 3 Bl. Com. 302. Ham. 152. 14 Viner. 473, 574. Co. Lit. 198, *a*. It is a general rule, that where two are entitled to a right *ex delicto*, and

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one dies, it remains wholly to the survivor. If then at common law the *right*, that is, the *cause of action* survives, though the action abates, the question remains, Does this *action* survive under the statute? From a recurrence to the English statute before noticed, it will be seen, that the rights of the executor and the rights of the survivor to prosecute the suit are wholly different. The language of the statute in the case of executors is, "if the *action* might have been originally prosecuted, &c. it shall not abate;" in the case of the survivor, it is, "if the *cause* of action should survive, &c. the suit shall not abate." This distinction in the English statute is noticed for the purpose of showing that any decisions that may have been made under the statute as applicable to executors, and which have been relied upon in this case, cannot apply to survivors. The *form* of action is embraced in the former—the *cause* of action in the latter. Neither, however, is construed as giving any new rights —the object is, to prevent delay and the expense of a fresh suit.

But for the statute *de bonis asportatis* no action *ex delicto* could now be maintained by an executor. Such actions are sustained by survivors every day, and this without the aid of any such statute. It follows then, of course, in England, if the *cause* of action survives, the *action* then would be saved. The doctrine referred to by the defendant's counsel in Hammond and Taunton is perfectly consonant to the grounds here taken. The case of the abatement of the suit of the husband and wife, by the death of the wife, and not by that of the husband, clearly marks the distinction, that when the cause of action survives to the survivor, the action does not abate —otherwise it does. No other case is shown of the abatement of a joint personal action by the death of one of two or more joint plaintiffs, since the statute 9 William III. than of such as are in the name of husband and wife. And the reason why husband and wife join in the action, is not, as in the case of other joint plaintiffs, because they have both an interest in the thing demanded, but because of the union of person by the marriage. From examining our statute before referred to, it will be noticed that *form* of action is not regarded. In both cases, as well of the decease of a sole plaintiff, as of one of two or more plaintiffs, if the *cause* of action survives, the suit shall not abate. Our statute is also unlike the English statute *de asportatis*, as to the rights which are given to the

plaintiff's executor. If this action had not been instituted by Wright and Lovett, there can be no doubt that Wright, as survivor, would have been entitled to sue, as well as any other creditor of Mumfred Eldred. The suit then cannot abate, the cause of action surviving. The ground taken in deciding this case renders it unnecessary to examine the question whether the action given by the statute is remedial or penal.

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There must be a *respondeas ouster*.

HURD *vs.* TUTTLE and SMITH.

To prove the possession of a defendant in an action of ejectment, it is sufficient to prove a third person in actual possession under the defendant; and if it appear on trial that such third person is in possession of the premises, under a contract in writing between him and the defendant, the possession of the defendant is sufficiently proved, and it is unnecessary to produce such written contract.

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THIS was an action of ejectment for one acre and one quarter of an acre of land in Sandgate, with a dwelling house and barn thereon. On trial upon the general issue at the last February term, the plaintiff produced evidence of title to the premises by the levy of an execution in his favor against Michael Bennet, on the 14th day of May, 1821, and by proof that Bennet was in possession of the premises at the time of the levy.

The plaintiff also proved by parol testimony that the defendants went into possession of the premises in the fall of the year 1821, and that, in the spring of the year 1822, and before the commencement of the plaintiff's action, Gailor Nichols went into possession of the premises, under a lease or contract in writing between him the said Gailor and the defendants.

The Court decided that this was not legal evidence of the fact that said Gailor Nichols was in possession of the premises under the defendants, but that it was necessary for the plaintiff to produce the lease or written contract between said Nichols and the defendants, and directed a nonsuit, with leave to the plaintiff to move to set it aside. And at the present term the cause again came on to

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be heard on a motion by the plaintiff to set aside the nonsuit, and for a new trial.

Church for the plaintiff.

The question in this case is, whether it is not competent for the plaintiff to prove by parol that Gailor Nichols was in possession of the premises at the time the action was commenced, under the defendant, without producing the contract or lease in writing from the defendant, under which he took possession. Possession or tenancy is a fact that may be proved by parol evidence. 7 John. 186. Van Allen *v.* Vosburgh.

The contract between the defendant and Nichols under which Nichols took possession, is a collateral fact, and not the foundation or ground of action; therefore, it is contended that the possession of Nichols under the defendants may be proved by parol evidence; and that it is not incumbent on the plaintiff to produce such writing to prove the fact that Nichols held under the defendants. Anthon. Rep. 40. 1 John. 340.

The contents of any writing which does not constitute the ground of action, and is collateral only in the suit, may be proved by parol, especially if it lie not between the parties to the suit. 12 East. 237, (note *a.*) 238. Wood *v.* Morris.

Bennet for the defendants.

The plaintiff cannot excuse himself from observing the strict rules of evidence, on the ground that the lease in writing is collateral to the action; for the law requires the same strictness of proof as if the action had been founded on stipulations or covenants in the lease. But the plaintiff having it in his power, as must be presumed, to produce the written instrument in question, has himself assumed to decide on its legal sufficiency and effect, and its execution by the defendants, which assumption the law will not permit. In short the common rule, that the best evidence shall be given which the nature of the case admits, clearly requires the lease to be produced.

WILLIAMS J. delivered the opinion of the Court.

As the only inquiry in this case was, as to the possession of the defendants, it was sufficient for the plaintiff to establish the fact, that the defendants were in the actual occupancy of the premises

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in the fall of the year 1821, and that another received the possession from them. The written contract or lease, by virtue of which the tenant took the possession, could not have furnished any better evidence of that fact than the testimony produced. If the terms of the tenancy of Nichols under the defendants had come in question, the lease would have furnished the best evidence of these terms; but neither the terms nor the execution of the lease could have come in question in this case. It was sufficient for the plaintiff to know and to prove that the person in possession was placed there by the defendants, who had themselves been in the actual occupation of the premises. He could not be supposed to be acquainted with the contract existing between the defendants and their tenant; neither could it be material for him to introduce if it had been known.

Nonsuit set aside and new trial granted.

[Chief Justice Skinner having been of counsel did not sit in this cause.]

DEMING and WELLMAN *vs.* S. and E. HURLBUT.

A verdict will be set aside on proof that a Juryman, before the hearing of the cause, declared that he could not give a verdict against the party, in whose favor the verdict was given; with proof also, that the party against whom the verdict was given had no knowledge of such declaration until after the trial.

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THIS was an action of trover, for corn, rye, and meal-bags. On trial upon the general issue, it appeared in evidence that the plaintiffs were distillers, and the defendants millers, in the town of Dorset. That certain bins were erected by the defendants, in their mill, designed chiefly for the use of the plaintiffs in storing grain and meal. It also appeared that the plaintiffs did occupy said bins for storing their grain and meal. It further appeared, that a hole was bored from below, through the floor, and through the bottom of one of the bins in which the plaintiffs stored their grain. And that, at different times, corn was seen on the floor directly under this hole; and that corn was also frequently seen in the morning under the mill, and under the bin on the ground near the water's edge:

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and that the defendant's hogs were frequently seen eating it. It further appeared that the plaintiffs, on or about the 29th of December, 1820, had stored in said bins a quantity of corn—what quantity did not appear. It appeared that the defendants also put some corn into the bin in which the plaintiffs' corn had been put—what quantity did not appear, nor was there any evidence that there was any of the defendant's corn in the bin at the time when the plaintiffs put in their corn. It further appeared that the defendants owed one Noble Bostwick some grain, to be paid about the first of January, 1821. And at that time the defendants turned out to said Bostwick about one hundred and sixty bushels of corn. That some of the corn was taken from the house of the defendants, and some from the bins in the mill.

The Court, in their charge to the Jury, directed them, that as the bins were in the mill and in the possession of the defendants, they might put grain of their own into the bins, with the plaintiffs', and if they took out no more than they put in, the plaintiffs were not entitled to recover. For that the defendants had a right to mix their grain with the grain of the plaintiffs, provided they did not take out more than they put in, there being no question as to the quantity of the grain. Whereon the Jury returned a verdict for the defendants. To which opinion of the Court the plaintiffs excepted and moved for a new trial. And as a further reason for a new trial the plaintiffs stated, and verified by affidavit, that Benajah Cook, of Arlington, was one of the Jurymen sworn upon the Jury who tried said cause and found said verdict against them the plaintiffs. And that said Benajah Cook in a conversation relative to said cause, in the month of December, 1821, with said Elias Hurlbut, stated and declared to said Elias, that he had no doubt but that the defendant ought to recover in said cause, and that if he should ever have an opportunity to sit as a Juryman in the trial of it, he could not give a verdict against the defendant. And that the plaintiffs were wholly ignorant of said conversation, and had no knowledge of said declaration of said Cook until after the trial of said cause.

And at the present term the said cause came on to be heard on said motion for a new trial.

Sheldon for the plaintiffs.

It is a settled principle of law, that whenever one person wilful-

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ly mixes his grain with the grain of another, the whole belongs to the person whose rights have been thus invaded. 2 Bl. Com. 405. The reason on which this rule of law is founded is obvious. By such intermixture the quantity belonging to each is uncertain —this uncertainty itself would be an injury to the person with whose grain another has mixed his own. The law says with great propriety, that the innocent party shall not sustain this injury, but he shall be entitled to the whole, and the person who made the intermixture shall forfeit his own. This principle of law clearly applies to the present case. That the bins were in the defendant's mill, and even that the bins belonged to the defendants varies not the case; it is enough that the plaintiffs had license from the defendants to put their grain into the bins; for the defendants could in such case have no right to intermix their grain with the plaintiffs:' and the injury they have sustained is precisely the same as though the plaintiffs had been the owners of the mill and the bins.

But if we are incorrect in this, yet we contend that the plaintiffs are entitled to a new trial, on account of the misconduct of the Juror. It is in proof, and the fact is clearly established, that the Juror had declared before the trial, that he would never give a verdict in this cause for the plaintiffs, or rather that he would never give a verdict against the defendants, and that this was wholly unknown to the plaintiffs until after the trial. The law is settled that this is a sufficient cause for setting aside a verdict. 1 Sellon's Practice, 490. 2 Salk. 645. 21 Vin. 483. 3 Dallas, 515. 6 Bac. 668.

Bennet for the defendant.

We insist that the plaintiffs are not entitled to a new trial, on either ground on which they rely, for that,

1.—The charge of the Court was correct. The rule of law in relation to the confusion of goods, extends only to cases of wilful intermixture, and that by a person not at all interested in the chattels with which he intermixes his own. 2 Bl. Com. 405. In this case the defendants had the interest of bailees.

2.—But if the charge of the Court was incorrect in this particular, the plaintiffs' rights could not be affected by it, as it appears from the case, that there was no evidence before the Jury of an intermixture of grain, it was simply laying down an abstract principle of law.

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That one of the Jurors had before the trial formed and expressed an opinion respecting the cause, although a cause of challenge is no ground for a new trial.

If one of the Jurors is related to one of the parties—has a suit pending with one of the parties against whom a verdict is found, or is not a freeholder, the Court will not grant a new trial. It is only a cause of challenge. In the present case it was sheer negligence that the party did not inform himself of the objection to the Juror, and make the challenge. It would be of most dangerous tendency to make this a ground for a new trial.

Again, it appears from the case stated, that justice was done between the parties. Indeed, the verdict given was the only one which the evidence could in any way warrant. The granting of new trials rests in the sound discretion of the Court, and they will not grant a new trial where substantial justice has been done.

WILLIAMS J. delivered the opinion of the Court.

In this cause the plaintiffs move for a new trial on certain exceptions to the charge of the Court to the Jury, and also for that one of the Jurors formed and expressed an opinion, as to the merits of the cause previous to the trial.

It will be unnecessary to decide upon the exceptions to the charge, as the Court are clear that on the last ground a new trial must be granted. I should be unwilling to disturb the verdict in this case, as the facts were very fully investigated, did I not consider the law as fully settled. It is in proof that the Juror, previous to the trial, declared that it was his opinion that the defendant ought to prevail, and that he was sometimes on the Jury, and if he should be thereafter, when this cause should come on to be tried, he could not give a verdict against the defendant. It is admitted that this was a good cause of challenge; and it is laid down in Swift's Digest, 775, that where the party when the Jury was empanelled was ignorant of a principal challenge to a Juror, and discover it after verdict, this may be a ground to set aside the verdict. It is not necessary to go this length in deciding the present question; and, indeed, a decision, the 4th Dallas, Hollingsworth *v.* Duane, seems to be at variance with it. Without, therefore, giving any opinion whether the discovery of a principal challenge to a Juror after the trial, which the party, in the use of due diligence, might

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have been apprised of before the Jury were empannelled, or the discovery of the want of qualification of a Juror, which does not affect his integrity or ability, would be a sufficient reason for setting aside a verdict, the Court are clearly of opinion, in the case under consideration, from an examination of all the authorities that the Juror having declared that he could not give a verdict against the party who prevailed, is a sufficient reason for setting aside the verdict. The cause cannot be said to have had a trial by a disinterested and impartial Jury, when one of them had before the hearing of the cause made this declaration, which must have been known to the defendants, of which the plaintiffs had no knowledge. 2 Salk. 645, Dent *v.* the Hundred of Hertford. 1 Strange 640, Parker *v.* Thornton. Plow. 118. 3 Dallas, 515, United States *v.* Ives, are strong authorities in favor of the motion. The verdict must therefore be set aside, and a

New trial granted.

[The Chief Justice did not sit in this cause. Judge Aikens was not present at the hearing, but he assented to the opinion.]

Brace *vs.* Squire and Robinson.

If a writ of error be made returnable, not to the next term of the Supreme Court, one or more terms intervening between the allowance of the writ and the return, it is irregular and void, and cannot be made to operate as a supersedeas. In such case a second writ of error may be a supersedeas.

Bail on a writ of error are not in all cases holden for the amount of the judgment if it be affirmed, but by statute are made liable only for the actual damages occasioned by the delay, and for single or double costs as they may in the discretion of the Court be taxed on the affirmance of the judgment.

Bennington, May, 1824.

THIS was an action of debt on a bond of recognizance in the penal sum of $1200, for the prosecution of a writ of error, entered into agreeably to the eight section of the Judiciary Act, passed November 4, 1797. (1 Stat. 57.)

The writ was dated October 25, 1820, from which, and the pleadings thereon, in which oyer of the former proceedings was prayed and granted, the following facts appeared: That the plain-

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That one of the Jurors had before ... it of attachment pressed an opinion respecting the ... tate of New-York, challenge is no ground for a new ... was entered. That

If one of the Jurors is relat... the plaintiff recovered suit pending with one of the ... on County Court, for the found, or is not a freeholde... 94 costs of suit, and thereof It is only a cause of ch... ary 5, 1818, and made returna- negligence that the pr... ate. That this execution was put to the Juror, and m... er, who, on the 2d day of March, 1818, gerous tendency ... urn thereon :—"By virtue of the within

Again, it app... made the most diligent search throughout my tween the pr... not find either the body of the said Daniel Rog- which the ... property or estate whereon to levy or satisfy this exe- new tria... Attest, Hiram Hinsdale, Constable." That on the 23d not gr... January, 1818, Rogers prayed out a writ of error on said ... judgment, returnable to the Supreme Court at their term holden at Bennington on ———, on which one David Henry became recognized to the defendant in error, in the sum of $1200, and which was served on the 2d day of March, 1818.

To this writ a plea in abatement was pleaded, for that, a term of the Supreme Court intervened between the *service* and the *return day* of said writ of error; and the same was for that cause abated. That afterwards, on the 22d day of January, 1819, the said Rogers prayed out a second writ of error, in which the present defendants became recognised to the said Brace in the said sum of $1200, upon which was indorsed the certificate of the *oath* agreeably to the 1st section of the act of November 1, 1809, and which was duly served on the 9th day of June, 1819. That afterwards, at the January term of the Supreme Court, holden at Bennington, A. D. 1820, the judgment of the County Court was, upon the second writ of error affirmed; and there was also added to the judgment, damages for the detention of said debt, with the additional costs on said writ of error, amounting in the whole to the sum of $1114 74 damages, and $31 84 costs; upon which last judgment execution was also issued, and returned with a *non est inventus* endorsed thereon; the costs on the affirmance were tendered by the defendants and accepted by the plaintiff without prejudice; Whereupon the present suit was brought; pending which, at the

August term, 1821, the following motion was filed by the defendants, with the consent of the plaintiff:—

"And now the said David Robinson, Jun. and Truman Squire, here in Court, move this Court that upon the payment of the further sum of seventy-five dollars, being the *interest* on the sum of debt and cost of the former judgment from the time of the allowance of the writ of error to the time of the affirmance, and the *interest* on the same from the time of affirmance, that the plaintiff stay all further proceedings."

The case was argued by *D. Chipman* and *Langdon* for the plaintiff, and by *Squire* and *Robinson*, the defendants *pro sese*.

[Skinner Ch. J. and Williams J. having been of counsel in the cause, did not sit.]

And now at the adjourned term of said Court, holden at Manchester, within and for said County, on the 23d day of May, 1824,

AIKENS J. delivered the following opinion:

The more regular course would have been for the defendants to have moved the Court for a rule upon the plaintiff to shew cause, why, &c. which would have been granted *nisi*, and, on the hearing, have been made absolute, or discharged, as justice might require. As the defendants' motion was intended as a means of arriving at the same result, I shall pass over this informality without further remark, and treat the case as though such rule had actually been granted.

This rule can be supported only upon one of three principles. 1st, That the second writ of error was no supersedeas,—or 2dly, That the bail on a writ of error is in no case answerable for the amount of the original judgment, or—3dly, That admitting the first two positions to be unfounded, still from the facts in this particular case appearing upon the record, it is conclusive, that no damage can have accrued to the plaintiff by reason of this writ of error, beyond the sum stipulated in the motion.

If the first position be tenable, it is clear that the defendants have been over liberal in the offer contained in their motion; for unless the writ of error upon which they became recognised, possessed the quality of a supersedeas, it could occasion no delay to the original plaintiff in the collection of his debt—consequent-

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ly no damage; and he would be entitled, on affirmance of his judgment, not even to the interest thereon, pending the writ of error, but simply to his costs, single or double, as the Court in their discretion should award.

It has been attempted to support this position on the ground that the first writ of error was abated, and that for a cause originating in the fault of the party, and consequently that this second writ was not in law a supersedeas. It is true, the authorities seem to go thus far; (1 Mod. 285. 1 Salk. 263. 8 T. R. 412.) but there is one fact in the case, which, it is apprehended, renders them inapplicable. The cause assigned in the plea of abatement to the first writ of error, was, "that a term of the Supreme Court intervened between the service and the return of the writ." The writ was not therefore, defective and abatable merely, but irregular and absolutely void, (Parsons *v.* Lloyd, 3 Wils. 341. Black 846. 1 Sell. Prac. 83. 3 Dallas.) For if a process may be made returnable past one term, it may past ten; and the rights of the other party suspended and jeopardized by it for any period. It was, in the language of DeGray, in Parsons *v.* Lloyd, a mere nullity. And, although Lord Holt, in Shirly *v.* Wright, 1 Ld. Raym. 775, declares there is a distinction in this respect, between writs of capias with respect to mesne process and execution, yet the reason of the distinction would place a supersedeas on the same footing with mesne process, although it be in form a *summons*, because of its *immediate* effect upon the existing rights of the party. It is true it was pleaded to, but this was unnecessary; it would have been more properly dismissed on motion. Nor did that proceeding give it the character of an erroneous or defective process, which is good until reversed, and may be abated or amended. That which is void has none of these qualities; it is binding on no one; it will not justify the party acting under it; it is incapable of amendment, and any proceeding founded upon it would be liable to be set aside. The first writ of error being irregular and void, the second is, what it would have been if the first had never existed, a supersedeas from the time of service; it being regularly sworn to, agreeably to the 1st section of the act concerning writs of error, &c. passed November 1, 1809. It may be proper to remark here, as the contrary was urged in the argument of this cause, that it is not by virtue of

this statute, or any other statute of this state, except that adopting the common law of England, passed November 4, 1797, that a writ of error, under any circumstances, is a supersedeas here. A writ of error, therefore, which in England would not be a supersedeas of execution, would not possess that quality here, even though all the prerequisites of the statutes on the subject were complied with. They are restrictive, and not creative of any power or quality in the writs to which they relate.

The defendants then, having entered into a recognizance, agreeably to the 8th section of the Judiciary Act, for the prosecution of a writ of error; which writ, from the service of it, that is, from the 9th day of June, 1819, was a supersedeas of any execution of the plaintiff then or afterwards in life, upon his original judgment, the question involved in the second position, above named, arises, that is, What is the extent of this obligation?

The terms of the condition are, "that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good." The operation of which, as it regards the *bail*, can be no other than this, that if *he* fail to do it, *they* will do it for him. What then is the true meaning of the expression, "all damages and costs?" In England, no less than five statutes have been passed, providing for bail for the prosecution of writs of error in divers specified cases, and prescribing the condition of recognizances. The first, that of 31 Eliz. c. 3, as it is confined to cases of error after outlawry, contains nothing applicable to the present inquiry. The second was the statute of the 3 Jac. I. c. 8, whereby it is enacted "that no execution shall be stayed, &c. (in certain cases enumerated) unless *such person or persons*, in whose name or names such writ of error shall be brought, *with two sufficient sureties*, such as the Court (wherein such judgment is or shall be given) shall allow of, shall first, before such stay made, or supersedeas to be awarded, be bound unto the party for whom any such judgment is given, by recognizance to be acknowledged in the same Court, in *double* the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with *effect*; and also to satisfy and pay (if the said judgment be affirmed) all and singular the debt, damages, and costs adjudged upon the former judgment, and all costs and damages to be also awarded upon

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the delaying of execution." The next statute was the 13 Car. II. c. 2, extending the provisions of 3 Jac. I. c. 8, to a variety of cases, and giving double costs to a defendant by delay of execution by reason of error brought, if the judgment be affirmed. Next came the 16 and 17 Car. II. c. 8, extending the provisions of Jac. I. to other cases still, and requiring bonds to be given also, in error to be brought upon any judgment after *verdict* in any *writ of dower*, or in any action of *ejectione firmae*, conditioned that, in case of affirmance, discontinuance, or nonsuit, the plaintiff in such writ of error, should pay such costs, damages, and sum and sums of money, as should be awarded upon or after such judgment affirmed, discontinuance, or nonsuit had." By the expressions, "damages, and sum and sums of money," in this act, it was intended to make the plaintiff in error liable for the mesne profits, and for damages by any waste committed after the first judgment, as appears by the 4th section of the same act: and a writ of inquiry issues, in proper cases, to ascertain them. The 5th and last English statute on this subject, is the 19 Geo. III. c. 7o, extending the provisions of 3 Jac. I. to writs of error sued for the reversing of judgments given in the inferior Courts of record, where the damages are under £10 —a class of cases not embraced in any of the preceding statutes.

The provisions of the several statutes are full, unequivocal and uniform. No one can mistake the extent of liabilities of bail, in error, under them. They were familiar to our Legislature, when they passed the Judiciary Act; or certainly so, to the distinguished Jurist who framed it. Can it possibly be contended then, that our Legislature intended to make the bail in error liable for the amount of the original judgment, in all cases, where the plaintiff in error should fail to satisfy it? If so, why depart from expressions the best calculated to effect that object, and which, it is to be presumed, lay as a copy before them, and resort to the more equivocal language of our statute? It could be for no other purpose than to give to the Court a different rule of damages. This conclusion is strengthened by the fact, that in directing the condition of a recognizance upon the allowance of a writ of *audita querela*, in the 11th section of the same act, the Legislature have, in substance, adopted the specific and unequivocal language of the English statutes. And there can be no doubt but in the event there contemplated, the bail must be adjudged to pay the original debt, damages, and cost.

The expression, "all damages," in the 8th section, cannot be construed as synonymous with the expression, "just damages, &c." which occurs in the last clause of the same section, and also in the 10th section. This is obvious, when we consider the necessary effect of a supersedeas in a variety of instances under our system of attachment, and arrest and bail upon mesne process, and the limited powers of the Supreme Court, in the cases contemplated in the 10th section, as applicable to those cases. It is there provided, that in case of a failure to enter and prosecute, to effect, a writ of error regularly served, or of nonsuit therein, the defendant in error may enter his *complaint* to this Court, praying for his just damages, and legal costs; and such Court shall award to such defendant 12 per cent. interest on the original judgment, *as damages*, and his costs, and issue execution accordingly. The Legislature, in these cases, regard the record as not being removed, and that this Court have no power over the judgment, not even to affirm it; but it remains as an existing and valid judgment, unexecuted in the Court below, and to be pursued there according to law. Yet it is obvious, that property, attached on the original process, may, in the mean time, have been discharged from the lien of such attachment; or bail thereon from their liability, by reason of a stay of execution. And 12 per cent. interest on the original judgment, which the act itself defines as the maximum of these just damages, (even if the 12 per cent. and double costs contemplated in the 3d section of the act of 1809 should be added) might, in such case, be a very inadequate compensation for the actual damage sustained.

I am driven back therefore, to the most simple and obvious construction possible; to wit, that the engagement to answer all damages and costs, is an undertaking, to pay all the actual damages which a defendant in error shall sustain, in consequence of the impetration and service of the writ, and the costs legally taxable in the defendant's favor upon such writ, either single or double, at the discretion of the Court. This is a construction which will do justice to all parties in all cases. It does not leave the defendant in error in a worse situation than it found him. Neither does it enable him to fix a debt, originally bad, upon the bail of the plaintiff under circumstances in which they cannot surrender their principal. The language of the statute is the broadest possible; and evidently so

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the delaying of execution." The next st[illegible] case. c. 2, extending the provisions of 3 Ja[illegible] I bear ses, and giving double costs to a de[illegible] Court, by reason of error brought, if th[illegible] law. came the 16 and 17 Car. II. c. [illegible] be, must I. to other cases still, and req[illegible] ll suppose to be brought upon any jud[illegible] hich it may er, or in any action of e[illegible] d attaches per- of affirmance, discontir[illegible] udgment and execu- of error, should pay [illegible] supersedes the execution money, as should b[illegible] y days from the time of ren- discontinuance, [illegible] property in execution. The prop- and sum and sr[illegible] sly discharged by statute. (Judiciary the plaintiff i[illegible] he writ of error B. disposes of the proper- by any wa[illegible] krupt. Now it is clear that in this case, the 4th secti[illegible] t A. in consequence of the impetration and service cases, [illegible] error, is the amount of his original judgment, and the subj[illegible] from the time he would have obtained it, to the time he Ja[illegible] obtain it of the bail in error. This, therefore, would be the [illegible]sure of damage in such case. Secondly, suppose B. did not serve his writ of error till after A. had levied his execution. The writ of error, though a supersedeas to the execution in the former case, would not be so in this. (Meriton *v.* Stearns, Willis 271. 1 Blac. 69. 8 Co. 191.) Here the actual damages of A. would be merely nominal, and nominal damages and the costs on the writ of error would be all he could recover of the bail. Thirdly, suppose again, that A. attached property to the amount of $500 only, which was all the property B. was possessed of—B. brings error, and supersedes the execution of A. whereby the lien on the $500 is lost; but B. in the mean time remains where he was, and worth nothing: Can it be pretended, that the damages of A. in this case, exceed the actual value of the property attached? And why should he be made better than he otherwise would have been, at the expense of the bail in error?

If it should be said that this rule is too uncertain in its nature, I answer, it is no more so than the Legislature themselves have expressly prescribed, in a class of cases somewhat analogous—that of escapes from gaol. (1. Stat. 281.) No more so indeed, than that

all cases of uncertain damages. And the fact, ...vated in a sum certain, to become absolute, makes no difference. The obligation, ...he power of the Courts to chancer, ...mple undertaking before express- ...ame rules.

...into the facts on record in ...t upon those facts can, by possi- ...al damage beyond the sum specified ...ence of the impetration and service of the ...nich the defendants were recognized: And if ...st be discharged; but otherwise made absolute. ...e recurring to the facts on record, I will explain what ...stood by the term "final judgment," when used in con- ...ion with the liabilities of bail, or the lien upon chattels, attached upon mesne process. It is *that judgment* rendered upon the *same* process on which the bail was entered, or the goods attached, upon which the Court, rendering the judgment, is authorized by the statute to issue execution. And this is the case with every judgment rendered on the merits, "where no appeal or review is by law allowed, or where no appeal or review hath been entered, or motion in arrest of judgment, or for a new trial, has been made within the times allowed therefor." And the day on which such judgment is deemed to have been rendered, for the purposes of charging bail and holding property, is that day, on which the plaintiff is "first, by law, without leave of Court, entitled to execution thereon." (Judiciary Act, sec. 28, 29, 34, 95. Explanatory Act. of do. passed Nov. 6, 1804.)

The plaintiff in this case obtained a final judgment upon what our statute denominates a mesne process, against one Rogers, on which Rogers had been arrested and procured bail. He took out execution thereon, dated January 5, 1818, returnable in 60 days, and put it in the hands of an officer (it is presumed) in season to hold the bail. On the 2d day of March following, 56 days after the date, the officer returned the execution, with a formal return of *non est inventus* indorsed thereon. By this return, the bail on the original process was fixed. It is true that the first writ of error was served, by the same officer, on the same day; but it is to be pre-

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sumed not until after the return of the execution; for otherwise the officer would have made a return of supersedeas on the execution. At any rate, it does not lie in the mouth of the plaintiff to question the return of his own officer, with a view to charge a stranger. If, then, the first writ of error had not been void, (as it would have been no supersedeas till served) the bail would nevertheless have been fixed. And it was the plaintiff's own fault if he neglected to sue out his *scire facias* against the bail, within the year, whereby the bail was discharged: For a writ of error, which *is* a supersedeas, does not prevent the plaintiff from proceeding by *scire facias* against the bail, when once a foundation for such proceeding is laid. (1 Tidd s Prac. 471.)

It is true, the Court might stay the proceedings on the *scire facias* pending the writ of error, if they saw fit; but that must be at the instance of the bail, and would not discharge him.

The next material fact, legally to be inferred from the record, as set forth on oyer of all the proceedings, and which was understood to be expressly alleged and admitted on the argument, is, that after the return of the first execution, the plaintiff never prayed out any other execution on that judgment. The consequence of which was, that on the 5th day of March, 1819, a year and a day after the expiration of the first execution, the vital powers and faculties of the judgment became, as it were, suspended by operation of law, and must remain forever lost to him, without some new act on his part to reanimate it. It is true, that at common law, when the defendant occasions the delay, the plaintiff may take out execution at any time within the year and day after the cause of delay has ceased to exist. But it must be a legal cause. It is not sufficient that the plaintiff *in fact* delays, for a reason, which, in law, was no impediment in the way of his proceeding. The supersedeas of a writ of error is an accident—a quality of the writ which the law attributes to it, and can have no existence independently of the writ itself. The one being void, the other had no existence. The delay, therefore, was the plaintiff's delay. And it was not until the 9th of June, 1819, more than three months after the plaintiff's judgment had, by his own neglect, become incapable of execution, that the writ of error complained of became clothed with the power of a supersedeas. But the plaintiff had nothing on which that power could exert it-

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self. A supersedeas only affects the execution. It does not affect the validity of the judgment—that remains as it was, until a judgment of reversal. It does not prevent the plaintiff from proceeding by action of debt or *scire facias*, on the judgment against the principal. And this is all that the plaintiff could have done with his judgment in its actual state, from the time of the service of the second writ of error, till the affirmance of the judgment upon it. The plaintiff, therefore, can have sustained no actual damage, in consequence of the impetration and service of this writ, and was entitled to none as against the bail.

Rule made absolute.

Lowrey *vs.* Hine and Griffin.

If a debtor be committed to gaol or an execution in favor of the Sheriff of the County, he is in the legal custody of the Sheriff, and a bond taken to the Sheriff for the admission of such debtor to the liberties of the prison is valid, and an action may be maintained on such bond in the name of the Sheriff.

Chittenden, January, 1824

THIS was an action of debt on a gaol bond, in which the plaintiff declared, that the plaintiff by the consideration of the County Court holden at Burlington within and for the County of Chittenden, recovered judgment in his favor against William Hine, of Colchester, in the County of Chittenden, for the sum of $127 27 damages, and for $13 22 costs of suit. That he took out an execution on said judgment, directed to the High Bailiff of the County of Chittenden, his Deputy, or either Constable of Colchester in said County to serve, &c. That he delivered said execution to Moses Bliss, High Bailiff of said County, who by virtue thereof, committed said William Hine to the common gaol in Burlington, &c. And Heman Lowrey (the plaintiff) then Sheriff of said County, being by virtue of his said office keeper in chief of said prison, afterwards, &c.—the said William Hine then imprisoned as aforesaid, for the cause aforesaid, in the custody of the said Sheriff, did admit to the liberties of the said gaol yard, and on that occasion, and to indemnify the said Sheriff against any escape, which the said William Hine might commit in the premises, the defendants on the day

Chittenden, January, 1824.

Lowrey *vs.* Hine and Griffin.

and year last aforesaid, &c. executed a bond to the said Sheriff, with a condition thereto annexed in legal form. The declaration then alleges the escape of the said Hine, and concludes in due form.

To this declaration the defendants demurred.

Griswold and *Follet* for the plaintiff.

A. Foot for the defendants.

AIKENS J. delivered the opinion of the Court.

It is objected by the defendants, that the plaintiff being the judgment creditor, and also Sheriff of the County and keeper in chief of said prison, he had no authority to take said bond, and that the same is void. But the argument of the plaintiff is deemed conclusive on this point. The law recognizes but one keeper in chief of the gaol, at one and the same time. The Sheriff was at the time Hine was committed, and at the time the bond was executed, the legal keeper of the prison; nor are his powers, as such, suspended by the statute in relation to his own debtors. If there is any evil to be apprehended from the exercise of these powers, in cases like the present, it is for the Legislature who conferred them, and not for this Court to remedy it.

It is also objected that the declaration does not state that the judgment therein mentioned, was rendered in an action of debt, covenant, contract or promise. That allegation is unnecessary since the passing of the act of the 22d of October, 1807, repealing the act of the 31st of January, 1804; that fact is to be presumed until the contrary appear. There must therefore be

Judgment for the plaintiff.

Rutland, February, 1825.

C. H. ATHERTON, Executor of J. ATHERTON,

vs.

FLAGG and PARKER, Administrators of J. PARKER.

Claims allowed by Commissioners against an estate represented insolvent are considered as judgment debts, and being such, no plea founded on the merits of the original contract can avail.

An action of debt for the recovery of such claim is not an action of debt on "any lending or contract," without specialty: and is not within the limitation of six years.

All the real and personal estate of a deceased person constitute a fund in the hands of the administrator for the payment of debts, and are to be by him reduced to cash for that purpose. And every claim against an estate represented insolvent, of every nature, whether by the terms of the contract, it be due *in presenti* or *in futuro*, is considered as due and payable, and is to be allowed against the estate at its value in money.

THIS was an action of debt, in which the plaintiff declared, that at a Probate Court holden by and before Joseph Randall, Esq. Judge of the Court of Probate within and for the District of Rutland, at Clarendon in said District, on the 26th day of July, 1808, the said Ebenezer and Rufus were by said Court duly appointed administrators upon the estate of the said Jonathan, and on the day and year last aforesaid, at Clarendon aforesaid, represented to the said Judge of Probate, that the estate of the said Jonathan was insolvent and insufficient to pay the just debts and legal charges against said estate: Whereupon the said Judge of Probate, at Clarendon aforesaid, did appoint Thomas Stewart, Moses Chaplin, and Jonas Paige, Commissioners to receive and examine the claims of the several creditors which might be presented against said estate, and allowed six months from the said 26th day of July, 1808, for the creditors of said estate to exhibit and substantiate their claims to said Commissioners, and the said Jonas, Thomas and Moses, &c. appointed Commissioners as aforesaid, afterwards, to wit, at Rutland aforesaid, on the 2d Monday of February, 1809, duly returned into the office of the Register of Probate for said District a list of the claims by them allowed against said estate, amounting in the whole to $15,195 24, among which was a claim allowed to the said Joshua in his life-time, at the sum of $277 65—the above demand against the estate of said Jonathan, and the said return was by the

Rutland, February, 1825.

Atherton *vs.* Flagg and Parker.

said Judge of Probate on the day and year last aforesaid at Rutland aforesaid, examined, allowed, approved, and ordered to be recorded; all which will more fully and at large appear by the record, return and files, and proceedings of record before said Court of Probate now remaining. And the plaintiff further says, that at a Probate Court holden at Rutland, within and for said Probate District, on the 4th Monday of November, A D. 1809, before the Hon. Joseph Randall, Esq. Judge of Probate for said District, on the application of Isaac Eddy and Jonas Stone, creditors to the estate of the said Jonathan, for an order or claim on the defendants, administrators as aforesaid, that they pay the debts against the estate of the said Jonathan, as returned by the said Commissioners appointed to receive and examine the claims against said estate, and said defendants, administrators as aforesaid, having been duly notified to appear, and showing no sufficient cause to the contrary, it was ordered and decreed by said Judge, that said defendants, administrators as aforesaid do pay the debts of the said deceased in eighteen months from the day of the return of the Commissioners of the list of claims against said estate, and the defendants, administrators as aforesaid, afterwards, to wit, at a Probate Court holden at Rutland aforesaid, on the 2d Monday of January, 1810, before the Hon. Caleb Hendee, Jr. Judge of Probate for said District, and within sixty days from the making said order or decree, prayed for and were admitted to an appeal from said order or decree, to the Supreme Court of Judicature, then next to be holden at Rutland, within and for the County of Rutland, on the Tuesday next following the 4th Tuesday of January, 1810, and said appeal being duly entered on the docket of the Supreme Court at their term aforesaid, such further proceedings were had in said suit of appeal that afterwards, to wit, at the term of the said Supreme Court begun and held at Rutland aforesaid, on the Tuesday next following the 4th Tuesday of Jan. 1812, that the said order and decree of said Court of Probate was affirmed and ratified by said Supreme Court, all which will appear by the records and proceedings of said Supreme Court before said Court remaining. And the plaintiff in fact saith, that said order or decree so affirmed and ratified by said Supreme Court as aforesaid, is now in full force, and is in no way reversed or annulled. That said claim of said Joshua, a creditor to the

estate of said Jonathan Parker, was not paid by said defendants to said Joshua in his life-time, nor has the same been paid to him the plaintiff as executor as aforesaid, since the death of the said Joshua, but that the same is still due and owing to the plaintiff as executor as aforesaid, and that the time affixed by the said order and decree of said Judge of Probate for the defendants, administrators as aforesaid, to pay the debts found due against the estate of said Jonathan, ratified and affirmed as aforesaid by the said Supreme Court of Judicature, has long since expired. And that he, the plaintiff, executor as aforesaid, on the 15th day of May, 1812, at Clarendon aforesaid, applied to the defendants, administrators as aforesaid, for payment of the said sum of $277 65 allowed as aforesaid to the said Joshua in his life-time against the said estate of the said Jonathan, who have refused and still do refuse and neglect to pay: Whereby an action hath accrued to the plaintiff as executor as aforesaid to have and recover of the defendants' administrators as aforesaid, the aforesaid sum of $277 65 above demanded. Yet the defendants' administrators as aforesaid, though often requested, have not as yet paid the said sum of $277 65, or any part thereof, to the said Joshua in his life-time, nor to the plaintiff, executor as aforesaid, since the decease of the said Joshua, but the said defendants, administrators as aforesaid, have hitherto wholly refused and still do refuse to pay the said sum of $277 65, or any part thereof, to the plaintiff, executor as aforesaid. To the damage of the plaintiff, executor as aforesaid, the sum of $400; to recover which, and the debt aforesaid, with just costs, he brings this suit, and the plaintiff brings into Court here the letters testamentary of the said Joshua deceased, whereby it fully appears to the Court here, that the plaintiff is executor of the last will and testament of the said Joshua deceased, and hath the execution thereof.

The defendants prayed oyer of the return of the Commissioners, allowing the claim aforesaid to the said Joshua in his life-time, which was read to them in the words and figures following, to wit: Joshua Atherton exhibited a note of the following tenor, to wit:

" *October*, 25*th*, 1794.

" For value received I promise Joshua Atherton to pay him or order the sum of one hundred and fifty dollars in good land in the County of Rutland and State of Vermont, at a reasonable appraise-

Rutland, February, 1825.

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ment, (if we cannot agree) with good title, in one week after the said Joshua, or his agent, or any body duly authorized under him, shall request the conveyance of the same, provided the request be made to me the subscriber personally, or my assignees at Clarendon in said State, with interest for said sum till discharged as aforesaid. "JONATHAN PARKER, Jr."

On which we allow two hundred and seventy-seven dollars 65 cents, including the interest to the 2d of January, 1809—$277 65. Which being heard and read, the defendants say that they do not detain the same sum of money from the plaintiff in manner and form as he has alleged, and thereof put themselves on the Country for trial. And for further plea in this behalf, by leave of the Court for that purpose had and obtained, The defendants say that the said cause of action did not accrue either to the said Joshua in his life-time, or to the said Charles as executor as aforesaid, at any time within six years before the commencement of the suit of the said Charles H. against them the defendants in this behalf in manner and form as the said Charles H. hath above thereof complained against them the defendants, and this they are ready to verify: Whereupon they pray judgment if the said Charles H. executor as aforesaid ought to have or maintain his aforesaid action against them the defendants. And for further plea in this behalf, the defendants say that the said Jonathan Parker in his life-time, to wit, at Clarendon aforesaid, on the 25th day of October, A. D. 1794, made, executed, and delivered to the said Joshua Atherton a certain note in writing of that date, a copy of which is here shown in oyer, whereby the said Jonathan in his life-time promised the said Joshua in his life-time to pay to him or order the sum of one hundred and fifty dollars in good land in the County of Rutland and State of Vermont, at a reasonable appraisement, if they the said Jonathan and Joshua could not agree, with good title, in one week after the said Joshua or his agent, or anybody authorized under him, should request the conveyance of the same, provided the request should be made to the said Jonathan personally, or to his assignees at Clarendon in the State of Vermont, with interest for said sum until discharged as aforesaid; and the defendants in fact say, that the said Jonathan Parker in his life-time, from the time of

making and executing said note, to the time of his decease was ready and willing, and the defendants as administrators as aforesaid, have at all times been ready and willing to pay the said Joshua in his life-time, and the plaintiff as executor as aforesaid, since his decease, the sum aforesaid, in good land in the County of Rutland aforesaid, at a reasonable appraisement, with good title, agreeable to the tenor of said note or contract; yet the said Joshua in his life-time, or the said Charles H. as executor as aforesaid, since his decease, or their or either of their agents, or any person authorized under them or either of them did not request the said Jonathan in his life-time, or the defendants, administrators, of the said Jonathan or the heirs of the said Jonathan, either personally or otherwise, at Clarendon aforesaid, or elsewhere, to convey said land. And the defendants further aver, that the said note or contract is the same note or contract which the said Joshua in his life-time exhibited to the Commissioners appointed to receive and examine the claims of the creditors to the estate of the said Jonathan Parker, and which was allowed to the said Joshua as set forth in the plaintiff's declaration, and in the return of the Commissioners, and which the plaintiffs have shown in oyer as aforesaid, and this they are ready to verify. Whereupon they pray judgment if the plaintiff ought to have and maintain his action aforesaid against them the defendants.

To the plea in bar there was a general demurrer.

Page for the plaintiff.

Langdon for the defendants.

AIKENS J. delivered the opinion of the Court.

The sufficiency of the defendants' first plea in bar, depends wholly upon the existing character of the plaintiff's demand. For, it is admitted in the argument, as well as implied by the terms of the plea itself, that if the report of the Commissioners, upon which the present suit is brought, possesses the character and attributes of a judgment debt, this plea is insufficient. Its rea character will sufficiently appear, from a consideration of the question presented by the demurrer to the second plea in bar.

The defendant's second plea in bar can be sustained upon no other ground, than that the plaintiff's cause of action, notwith-

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standing the adjudication of Commissioners thereon, the decree of the Judge of Probate approving the same, the order of payment thereof, and the affirmance of that order by the Supreme Court, still retains its primary character, and is liable to be satisfied in the same manner that it was by the terms of the original contract. The fallacy of such a principle will be obvious, on a slight recurrence to the provisions of the Probate act of 1797, under which these proceedings were had.

The discretionary power of *representing* an estate insolvent is lodged solely with the executor or administrator. When *he* has made his election, it becomes the duty of the Judge of Probate to appoint Commissioners to receive, examine and adjust *all* claims of the creditors of such estate. The distinction between an apparent and an absolute insolvency, has never been recognized in this State, nor does it appear to have been contemplated by the act above mentioned. All the provisisns for subsequent proceedings upon an estate represented insolvent, treat it as absolutely so, whatever may be the result in point of fact. Attachments are thereby dissolved. (Proviso to section 58.) All demands against an estate represented insolvent not exhibited to the Commissioners for allowance within the time limited for that purpose, are forever barred, unless the creditor can find some estate of the deceased not inventoried, or accounted for by the administrator. (Section 83.) All the real and personal estate of a deceased person, of which he died seized in fee simple, when represented insolvent, compose a fund in the hands of the administrator for the payment of the debts, and are to be, by him, reduced to cash for that purpose. The law will not permit any of the estate to be taken from him by legal process; neither can he dispose of any, without a breach of his administration bond, except under the statute, and in pursuance of the orders and decrees of the Probate Court.

These are the necessary consequences of representing an estate insolvent, under the statute, and are totally inconsistent with the idea that the contracts of the deceased can survive the *representation* of his insolvency, with a view to their specific execution by his representatives. The administrator, by this representation, empounds the estate, as it were, for the equal benefit of all the

creditors, and places it out of his own power, in contemplation of law, to fulfil any contract specifically.

The reports of Commissioners of claims, when approved by the Court of Probate, are to be paid in specie, and that too, only upon and by virtue of a decree of the Court of Probate for that purpose; which is tantamount to execution in ordinary cases of judgments at law. Hence the great propriety, and, indeed, we may add, legal necessity of treating them as judgment debts. They have, before, been decided to possess that character. (Bray. R. 41. 1 D. Chip. R. 423) They have uniformly, at least for a considerable time, been sued as such, in case of non-payment under the decree. And, being such, no plea founded on the merits of the original contract can avail the party.

It has been urged in the argument, by the defendants' counsel, that a construction of the statute, making *debt. solv. in fut.* payable *in pres.* would be unconstitutional. But this is not a proper view of the case. The law regards the obligations and contracts of a deceased person, whose estate is represented insolvent, as *impossible* to be fulfilled. And, they are, like the debts of a bankrupt, to be ascertained by the Commissioners, at their then present value, with a view to an equitable satisfaction out of the estate so far as it will go.

The reason why a construction thus affecting a subsisting contract between party and party, would be unconstitutional, is, that the existing rights of one of the parties would be injured or prejudiced thereby. But in these cases, there are, in the eye of the law, no existing rights to be impaired. The deceased has none; for civil rights do not appertain to the dead. His heirs have none; for the law cannot presume there will be any estate to descend to them: And as for creditors, their rights are secured in the best manner the nature of the case will admit of.

The judgment, therefore, is, that the defendants' two pleas in bar to which the plaintiff has demurred, are insufficient.

Rutland, February, 1824

CROCKER *vs.* SPENCER.

A cooking stove is not an article of ornament or luxury, but is an article of household furniture, necessary for upholding life, within the meaning of the statute, exempting certain articles of personal property from attachment and execution.

THIS was a writ of error brought to reverse a judgment rendered by the County Court for the County of Rutland, in an action of trespass brought by Crocker *v.* Spencer for taking a cooking stove and pipe, the property of Crocker.

To which Spencer in the Court below pleaded, That the plaintiff, from having and maintaining his said action thereof against him the defendant, ought to be barred, because he says that one Daniel Roberts, heretofore to wit, at Wallingford aforesaid, on the 7th day of October, 1822, prayed out a writ of execution in due form of law, from the office of Eliakim H. Johnson, Justice of the Peace for Rutland County, dated the day and year last aforesaid, for the sum $43 55 damages, and $1 62 costs of suit, and 25 cents for said writ of execution, signed by said Eliakim H. Johnson, Justice of the Peace, and made returnable within 60 days from date thereof, which said writ of execution, afterwards to wit, on the 29th day of October, 1822, at Clarendon aforesaid, the same then being in full life, was delivered to the defendant, then a Deputy Sheriff under J. Dike, Jr. Sheriff, to be by him, the Deputy, duly executed. And the defendant further says, that afterwards to wit, at Clarendon aforesaid, on the 29th day of October, 1822, he levied said writ of execution upon and took the said cooking stove and pipe, in said Clarendon, as the proper goods and chattels of the plaintiff, to satisfy said execution and his legal fees thereon, and then and there legally advertised the same to be sold at public vendue, on the 9th day of November, 1822, at the dwelling-house of the plaintiff in Clarendon aforesaid—the said execution and the officer's fees thereon not being paid and satisfied to the defendant, he afterwards, to wit, on the 9th day of November, 1822, at Clarendon aforesaid, according to the advertisement, sold said cooking stove and pipe at public vendue, to R. Marsh, he being the highest bidder, for the sum of $16. And the money arising from such sale he applied in part satisfaction of said execution and his legal fees thereon, as he

lawfully might do, and which is the same supposed trespass in the plaintiff's declaration mentioned, of which the plaintiff hath complained against him, and this he is ready to verify: Whereupon he prays judgment and for his costs.

To which plea the plaintiff replied, That for any thing therein contained he ought not to be barred, because he says, the defendant, on the day and year mentioned in the plaintiff's declaration, at Clarendon aforesaid, seized, took and carried away said stove, then and there being in possession and use of the plaintiff, to wit, at Clarendon, on the same 9th day of November, 1822, and which said stove was then and there in the dwelling-house of the plaintiff, and ever had been, and there was in actual use of the plaintiff as his property, and a necessary article of household furniture for the upholding of life: And he also avers that the same was not turned out by the plaintiff to the defendant to satisfy said execution.

To which the defendant rejoined, That the plaintiff ought not for any thing therein contained, to have and maintain his action aforesaid thereof against the defendant, because he says that the plaintiff, at the time, and long before the time of the alleged trespass in the plaintiff's declaration mentioned, lived and resided in a certain dwelling-house in Clarendon, in which was a chimney and fire-place, and oven, and that the plaintiff had at that time and was the owner of all the necessary utensils for cooking.

To which rejoinder there was a general demurrer in the Court below, and judgment for the defendant—to reverse which, the plaintiff brought this writ of error.

Strong for the plaintiff.

Page for the defendant.

AIKENS J. delivered the opinion of the Court.

The expressions in the statute, descriptive of the property of debtors, exempt from attachment and execution, are to be understood in a qualified sense. Without such construction, no tools, arms, or articles of household furniture would be exempted; for none of these can be said to be absolutely "necessary for upholding life," as people may subsist without them.

It becomes the duty of the Court, then, to define what the *neces-*

Rutland, February, 1824

CROCKER *vs.* SP

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a consciousness of their necessity.
rapid, that there is little danger of any
property in them, than his necessities seem
. Besides, an invasion of the domestic board,
.se of seizing upon articles in ordinary family use,
.ally be attended with much more of vexation and dis-
to the debtor and his family, than of utility to the creditor.
upon considerations like these that the cases cited in argu-
by the plaintiff's counsel, were decided. We are not dis-
posed to overturn those decisions.

A cooking stove is not an article of orn household furniture, necessary for up statute, exempting certain articles of execution.

THIS was a writ of er dered by the County C action of trespass bro cooking stove and r To which Sper tiff, from havin him the defen Daniel Rob 7th day o form of Peac for f ent by the plaintiff's counsel, were decided. We are not dis-

A cooking stove is an article of household furniture. It is calculated for no other use. It is not an article of ornament or luxury; and if it is not necessary, it is difficult to account for its origin or its continuance in use. Though of modern invention, it is, in the present state of the country, as necessary as any other single article of household furniture; and, when actually appropriated to the use designed, falls clearly within the reason of those cases. The stove in question was, therefore, exempt from execution, and the levy is not a justification of the trespass complained of.

Judgment—that there is error, &c. And the Court also consider that the defendant's rejoinder is insufficient.

Bennington, February, 1824.

RTON, Executors of ASAPH SHELDON,

vs.

al. Heirs of ASAPH SHELDON.

rvisor after the execution of his will,
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ne estate devised, it is of necessity a total revo-
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atement of this case will clearly appear from the opin-
the Court delivered by

AIKENS J.—This is an appeal taken by the heirs at law of Asaph Sheldon, deceased, from a decree of the Probate Court for the District of Manchester, approving his last will and testament.

An objection was taken, on the hearing, to the legality of the allowance of the appeal. The arguments urged on this point would have been properly addressed to this Court on the occasion of the allowance; and no doubt were then urged and duly considered. Finding the cause on the docket, and the appeal to have been allowed on petition of the heirs, at the last term of the Court, I consider that point as *res judicata*, and do not feel myself at liberty to review it.

It appears from the will itself, which bears date the 7th of March, 1816, that the testator, being then a widower, and owning two farms, one of which he denominated his "home farm," and the other the "mountain farm," and being possessed also of some considerable personal estate, after directing his just debts and funeral charges to be paid out of his personal estate, bequeathed the remainder of his property as follows:

Secondly.—I give to the natural heirs of my adopted daughter Sylvia, wife of Rix Kinne, of her own body begotten, the home farm on which I now live, being the farm purchased of the Rev. Increase Graves, together with about eight acres lying on the west end of said farm, with all the buildings and appurtenances thereto belonging. Also, I give to the said heirs of my said adopted daugh-

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ter, all and singular of my personal estate and household furniture, and the wearing apparel of my wife Abiah, late deceased, (above what is necessary to pay my just debts and funeral charges) excepting only my own wearing apparel. And I do hereby order, that all and singular of the above described property, both real and personal, shall, at my decease, come into the hands of my executors hereinafter named, and by them to be used for the necessary maintenance and education of the said heirs of my said adopted daughter during their minority, and also to allow, from time to time, to my said adopted daughter Sylvia, out of the above described property, so much as shall be necessary for her maintenance during the minority of her said heirs. And when the said heirs of the said adopted daughter shall become of full age, what shall then remain unexpended of the above described property, shall be equally divided between them, their heirs and assigns forever.

Thirdly.—I give to my nephew, Asaph Sheldon 2d, son of Ezra Sheldon, the farm where I formerly lived, called the mountain farm, and all my wearing apparel, to be his and his heirs and assigns at my decease.

He then proceeded to nominate the appellees executors to the will, and revoke all other wills by him made.

It was admitted that the will was freely executed, and that the testator was of sound and disposing mind at the time.

The heirs now appear and show cause against the affirmance of said decree, and for cause say, That since the signing and publishing of the said will, the said Asaph in his life-time revoked the same as his last will, testament and devise, and has sold, conveyed, and alienated all the real and personal estate therein mentioned, to wit, at Rupert, on the 1st day of January, 1821, which they offer to verify.

In support of this allegation they have proved the following facts:—

1st.—That on the 1st of April, 1817, the testator sold and conveyed the mountain farm to two men by the name of Farrer, for the consideration of $1700.

2d.—That on the 9th of June, 1817, he entered into a written contract with Olive Spencer, in contemplation of marriage with her, in which he secures to her the absolute use, control and dis-

position of her own property, and also covenants that she shall at all times, both in sickness and health, be entitled to a full support and maintenance, out of *his* estate, during her natural life, without using any thing in her support that was hers before her intermarriage with him; but that all her wants are to rest on him, and on his estate. Which maintenance she agrees to accept of him in dower, in case she should survive him. That the contemplated marriage was afterwards solemnized, and that she did survive him.

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3d.—That in the course of the year 1818, he addressed three several letters to his nephew, Asaph Sheldon 2d, who was then residing at Adams, in the State of New-York, in which he states in substance, that he is old and in trouble, having nobody to carry on his farm, and urges his nephew with great earnestness to break up at Adams, and come and live with him and take care of him—represents to his nephew that he will secure to him the one half of the home farm, which he states is worth $3000. That if the one half is not enough, he shall have more. Desires his nephew to sell off his wooden ware—says that he has a plenty of beds and bedsteads and iron ware, and that he should have of them. That in consequence of these repeated requests and proposals, his nephew did come and reside with him.

4th.—An indenture of lease and conditional sale, executed between the testator and his nephew, dated the 21st of January, 1819, by which he demises to his nephew the one half of the home farm, forever, and the other half, during the natural lives of himself and of his wife Olive, and the life of the survivor of them; for the consideration and upon the condition, that his nephew shall well support them and each of them during their respective lives. The lease to become void on a failure to comply with this condition. It is mutually covenanted in this lease, among many other things, that on the decease of the survivor of Asaph Sheldon the 1st, (the testator) and his wife Olive, the nephew shall render peaceable possession of that half of the farm which is leased for their lives, to the legal executor or administrator to the estate of the said Asaph the 1st, *that it may be appropriated to the use and benefit of the heirs of the said Asaph the 1st.*

5th.—A receipt dated April 19, 1821, executed by Nathan Burton, who is one of the executors named in the will, to the testator,

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for two notes of hand of $100 each, (being part of the avails of the "mountain farm") expressed to have been received to collect and to appropriate, at the discretion of Burton, for the purpose of furnishing necessary clothing and education to the children of Sylvia Kinne, as they shall stand in need; the same, or the unexpended balance thereof, liable however to be recalled from his hands by the said Sheldon at any time during his life, if he should see fit.

And the question is, whether these several acts of the testator do in law amount to a revocation of the will *in toto*, or not.

In deciding this question, I have looked into the authorities cited on the hearing, as well as many others, and have regarded with no small attention the nice distinctions of artificial reasoning and technical disquisition, with which they abound. I confess I have not derived that aid from the examination which I anticipated.

Revocations at common law were either express or implied—the latter are termed revocations in law, and might be effected in two ways.—1st, by a total alteration in the circumstances of the devisor.—2dly, by an actual or intended alteration in his estate.

I will here remark, that in England, a distinction is taken between those facts which may amount to an implied revocation at law, and in chancery. No such distinction is admissible here. The Judges of the Supreme Court are *ex officio* the Judges of the Court of Chancery. Appeals from the Probate Court are directed to be carried to the law side of this Court. And it would be ridiculous to thrust a party from that side of the Court to which the statute has sent him for justice, and at the same time tell him, that if he will approach us on the *other* side, he shall receive it!

The statute of this State respecting the revocations of wills and testaments, under which this question must be decided, is a literal transcript of the 6th section of the 29 Car. II. The construction of this clause of the statute in England has been, that it leaves revocations by conclusion and operation of the law in the same state in which it found them. This construction obviously renders the important provisions of the section in relation to revocations, altogether nugatory, except as to a particular mode of effecting an express revocation; whereas, the plain sense of the statute is, that *no* revocation, except such as reverts *ex necessitate rei*, shall be effected otherwise than expressly, and that too in one of the modes

therein pointed out. I am not prepared to go the length of the English decisions, as reported, on this subject. I feel bound to construe every constitutional act of the Legislature, in such manner as to give it full and complete effect. For certainly, the constitutional statutes of this State are not to be anuulled on the authority of any Court. I cannot admit that an alteration in the circumstances of the devisor will in any case amount to a revocation in law; or that an *intended* alteration in his estate, will have that effect. It is true, that the *intention* of the testator is to be principally regarded; but that intention is to be inferred from such facts only, as the statute authorizes us to notice.

But to proceed on principles independent of positive regulations Does the fact of a change in a man's circumstances afford a stronger presumption of an alteratior of his intentions, than the fact of his preserving his will unaltered and unrevoked does of his intentions remaining the same? I confess I am unable to see it in that light. The statute has secured the rights of widows unprovided for, and of posthumous children. The necessity of the rule, if it exist in England, is thus far obviated here. The only implied revocations therefore, known to the laws of this State, are such as result *ex necessitate rei*. It is said by Justice Buller, in his argument in the case of Goodtitle *v.* Otway, (1 Bos. and Pul. 615) that there is not a maxim in our law better established than this, that *all* implications are *ex necessitate*. That upon any other ground they would be capricious and arbitrary. *Such* a revocation may be either *total* or partial. If A. devise all his estate to B. and afterwards alienate the whole to C. it is necessarily a total revocation; for there is nothing for the will to operate upon. If he devise black-acre to B. and white-acre to C. and afterwards dispose of black-acre, it is a revocation *pro tanto*.

Revocations *pro tanto* may operate either by altering the *quality* of the estate in abridging the interest in, or diminishing the *quantity* of the thing devised.

And the rule is the same in relation to personal estate. If a tenant in common devise, and afterwards make partition, the devise shall nevertheless stand. (T. Ray. 240. 3 P. Will. 170.) So, if one seized of the entirety devise, and afterwards alienate an undivided moiety; for in both instances, the testator dies seized

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of the *old estate*, which he possessed at the time of the devise. It is not another and different estate acquired in the same premises by a purchase subsequent to the devise.

The case last put is precisely the case now in judgment. The perpetual lease of one half of the home farm to Asaph Sheldon 2d, operates *ex necessitate rei* as a revocation of the will *pro tanto*. And the lease of the other half, during the life of the *survivor* of the testator and his wife, has the same effect—*quo ad* the term. (Cro. Car. 23. Cro. Jac. 49.) Even a mortgage in fee, is, at this day, regarded only as a *charge* upon the devise, and consequently only a revocation *pro tanto*. (1 Vern. 329. 2 Ch. R. 154. 2 Ld. Ray. 968.)

It was contended in the argument that the covenant in the lease above recited, is an absolute conveyance of the remainder of the devise, after the expiration of the life-lease to the heirs of the testator; and that therefore, there was nothing left for the devise to operate upon. This is inadmissible. A man cannot legally convey his estate to his *heirs generally*, by deed, to take effect after his decease. If such an instrument could have any effect at all, it must be that of a devise. But the instrument in question has not the legal requisites to give it validity in that character. To permit it to take effect *as a deed*, would be in violation of that most wholesome and equitable provision of the statute, which gives to the creditor of a deceased person a lien upon his estate in the hands of his executors or administrators. This instrument is a *writing signed by the testator*, and is certainly expressive of an intention that the estate should pass to his heirs, instead of the devisees. But it cannot operate as an express revocation of the will. It was *not* executed with the legal formalities which the statute expressly requires in order to give it that effect.

After what has been observed, it is unnecessary to comment on the other facts in the case. I am therefore of opinion, that the facts exhibited in evidence by the appellants do not, in law, amount to a total revocation of the will. It may be proper to remark also, that this result appears to be in conformity to the principle of law as expressed by this Court in 1819, in the case of Parkhill *v.* Parkhill. (Bray. 239.)

The judgment of the Court is, that the decree of the Probate Court for the District of Manchester, approving the last will and testament of Asaph Sheldon of Rupert, deceased, be affirmed; and that the appellees recover their costs.

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Kimball, having taken out letters of administration on the estate of Barber, represented the estate insolvent; on which Commissioners were appointed by the Court of Probate, to receive, examine and adjust the claims of the several creditors to said estate. Bates exhibited to said Commissioners a claim against said estate, which they allowed and found due thereon from said estate the sum of $596 20. And the Commissioners, within the time limited by the Court of Probate, returned to said Court a list of the claims by them allowed against said estate—which was by said Court approved and ordered to be recorded; from which Kimball entered no appeal within the time allowed by law; but subsequently, by petition to the Legislature, obtained a special act allowing said Kimball an appeal from said report of the Commissioners, which he entered in the Probate Court agreeably to the provisions of said act.

Held, that a claim allowed by the Commissioners against an estate represented insolvent, is in the nature of a judgment debt; and although Kimball might in this case have vacated the judgment by entering an appeal within the time limited by law, yet as he neglected to do so, it became to all intents, a final judgment, as clearly so as though no appeal therefrom had been allowed by law, and could not be set aside by act of the Legislature. That in passing said act the Legislature exercised a power properly belonging to the Judiciary department, which by the Constitution they are expressly prohibited from exercising.

That said act is in the nature of a sentence or decree, rather than a law, being wholly retrospective in its operation, and depriving a party of a vested right—is a violation of the Constitution established by the people as the supreme law of the State, and therefore void.

THIS was an action of debt, originally commenced in the County Court to recover the sum of $596 20, in which the plaintiff declared, That heretofore, to wit, on the 1st Wednesday of December, A. D. 1821, Solomon Wright, Obadiah Dunham and Lodowick Stanton, all of Pownal aforesaid, were, by the decree and sentence of the Hon. Court of Probate for the Probate District of Bennington, in the County of Bennington aforesaid, holden at Bennington in said County, appointed Commissioners to receive, examine,

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adjust and allow all the claims of the several creditors to the estate of said Samuel Barber deceased as aforesaid, pursuant to the statute in such case provided. And whereas on the 31st day of Dec. A. D. 1821, at Pownal aforesaid, the said Solomon Wright, Obadiah Dunham and Lodowick Stanton, in obedience to said commission, having given previous notice agreeably to the statute in such case made and provided, and having been sworn according to law, were sitting to receive, examine, adjust, determine and allow the claims of the several creditors to said estate of said Samuel Barber deceased aforesaid, and the said Willard Bates, on the day and year aforesaid, at Pownal aforesaid, appeared before said Commissioners and presented his claim against the estate of the said Samuel Barber deceased aforesaid, for their examination, adjudication and allowance; and the said Commissioners then and there decided, adjudged and considered, that there was due to the said Willard Bates from the estate of the said Samuel Barber deceased, on the claim presented aforesaid, the sum of five hundred and ninety-six dollars and twenty cents, and the said decision and consideration of the Commissioners aforesaid was, on the 1st Wednesday of March, A. D. 1822, reported to the Court of Probate, and returned into the Registry of said Court of Probate, and by the order, sentence and decree of the said Court of Probate, the said decision and determination of the Commissioners reported and returned as aforesaid, was, on the said 1st Wednesday of March, A. D. 1822, ordered to be accepted and allowed, and ordered to be recorded, as by the record of said order and sentence of the said Court of Probate, ready in Court to be produced, will more fully appear—of which the said Isaac Kimball, administrator aforesaid, had notice—which said decision and determination of said Commissioners, and order, sentence and decree of said Court of Probate, still remains in full force and effect in no wise satisfied, set aside, annulled, or otherwise vacated; and that said Willard Bates hath not obtained any satisfaction of or upon the said decision and determination of the said Commissioners and decree and sentence of said Court of Probate for the said sum of $596 20 so adjudged, decreed and ordered by the Commissioners aforesaid and said Court of Probate as aforesaid, whereby an action hath accrued to the said Willard Bates, to have and recover of the said Isaac Kimball in his capacity of adminis-

trator aforesaid, the said sum of $596 20 above mentioned, out of the estate of said Samuel Barber deceased aforesaid, in the hands of Isaac Kimball, administrator as aforesaid. Yet the said Isaac Kimball, administrator as aforesaid, although often requested so to do, hath not as yet paid said sum of $596 20 allowed and awarded, or any part thereof to the said Willard Bates, but he so to do, hath hitherto wholly refused and still doth refuse: To the damage of the plaintiff the sum of, &c.

To which the defendant plead in the Court below *nul tiel record.* On which judgment was rendered for the plaintiff; from which judgment the defendant entered an appeal to the present term of this Court. And the acuse having been duly entered in this Court, the defendant filed the following plea in bar:

And now at this term of the Hon. Supreme Court, that is to say, at the first term after the appeal of this cause from the County Court for the County of Bennington, unto which term the plea aforesaid was appealed, comes the said Isaac Kimball, administrator as aforesaid, by Blackmer and Hall, his attorneys, and says, that the said Willard Bates ought not further to have or maintain his aforesaid action thereof against him, because he says, that after the appeal of this cause from the Hon. County Court, holden at Manchester, within and for the County of Bennington, on the first Monday of June, A. D. 1823, and before the entry thereof in this Court, to wit, on the third day of November, 1823, the General Assembly of the State of Vermont passed a certain act, entitled, "an act for the relief of Isaac Kimball, administrator on the estate of Samuel Barber deceased," of the tenor following, that is to say,

"It is hereby enacted by the General Assembly of the State of Vermont, that Isaac Kimball, administrator on the estate of Samuel Barber late of Pownal deceased, is hereby authorized and empowered, at any time previous to the first day of January next, to enter an appeal from the decision of the Commissioners on said estate allowing a claim of five hundred and ninety-six dollars and twenty cents to Willard Bates of said Pownal, to the next term of the Supreme Court to be holden within and for the County of Bennington, and the proceedings both before the Court of Probate and the Supreme Court, shall be in all respects the same as though the said Isaac Kimball had entered his appeal within the time allowed

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by law." As by the record of said act of the General Assembly remaining in the office of the Secretary of State among the records of said Assembly will appear. And after the passing of said act, and previous to the first day of January therein named, to wit, on the 17th day of December, A. D. 1823, at a Probate Court holden at the Probate office in Bennington, within and for the District of Bennington, the said Isaac Kimball, administrator as aforesaid, signified his objections to the said claim of five hundred and ninety-six dollars and twenty cents in the said act mentioned, in writing, to the Probate Court aforesaid, and filed the same in the Probate office of said Court, and also lodged in said Probate office, a copy of said act, duly certified under the hand and seal of Norman Williams, Secretary of State, and the said Probate Court then and there ordered and directed that notice of the same be given to the said Willard Bates, by serving him with a copy of all the said proceedings before said Probate Court at least twelve days before the present term of this Honorable Court as by the application of said Isaac Kimball, now on file in the office of said Probate Court, with the order of said Probate Court thereon, will more fully appear. And the defendant avers, that notice was given to the said Willard Bates agreeably to the order of said Probate Court, and that the said claim of five hundred and ninety-six dollars and twenty cents, recited in the said act of the General Assembly of the State of Vermont, is the same claim and allowance of Commissioners described and demanded in the plaintiff's declaration, and no other. All which he the said defendant is ready to verify: Wherefore he prays judgment if the said Willard ought further to have or maintain his aforesaid action thereof against him.

To which plea there was a general demurrer and joinder.

Merril and *D. Robinson, Jr.* for the plaintiff.

Hall and *Blackmer* for the defendant.

AIKENS J. delivered the opinion of the Court.

The question raised by the pleadings in this case, is upon the validity of the act of the Legislature, passed November 1, 1823, set forth in the defendant's plea in bar.

All questions arising under the constitution of this, or of the

United States, and especially such as affect the jurisdiction of the co-ordinate departments of the Government, are questions of importance, demanding great caution in their investigation, and correctness and firmness in their decision.

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It is a delicate and invidious task for one department of the Government to review the decision of another, on a point, involving the powers of either; and that delicacy is not a little increased in the present instance by the fact, that the Legislature have long been in the habit of passing acts of a similar character to the present.

The constitution of this State, Ch. 2, sec. 9, after defining the powers of the General Assembly, proceeds as follows: "But they shall have no power to add to, alter, abolish, or infringe, any part of this constitution." In Chap. 1, art. 4, it is further declared, that "Every person within this State ought to find a *certain* remedy, *by having recourse to the laws*, for all injuries or wrongs which he may receive in his person, property, or character: He ought to obtain right and justice freely, &c.—completely, and without any denial—promptly, and without delay, *conformably to the laws.*"

This constitution is the fundamental law of the State. The Legislature have not power to vary its provisions; yet, there is none so humble, but that he may demand his remedy, and is entitled to it, without delay, according to the laws, of which this is the chief. For this remedy, the injured citizen is referred to the Courts of Justice. The interpretation of the laws is the proper and peculiar province of the Courts. It must therefore belong to them to ascertain the meaning of the constitution, as well as the meaning of any particular act proceeding from the Legislative body.

It is our *duty*, therefore, as well as our prerogative, to declare that alone to be the law, which is reconcilable with this *fundadamental law*—this *fiat* of the sovereign people.

If, therefore, the act in question, shall be found upon examination, to be of that description, we shall feel constrained to say, that in its passage, the constitution was misapprehended.

Nor will this conclusion, to use the language of one of our most eminent jurists and statesmen, by any means suppose a superiority of the Judicial to the Legislative power. It will only be supposing that the power of the people is superior to both; and that where the will of the Legislature, declared in its statutes, stands in oppo-

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sition to that of the people declared in the constitution, the Judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. Fed. No. 78. Neither would we, in doing this, be understood as impugning the honest intentions, or sacred regard to justice, which we most cheerfully accord to the Legislature. But to be above error, is to possess an entire attribute of the Deity; and to spurn its correction, is to reduce to the same degraded level, the most noble and the meanest of His works. Conscious, therefore, of the necessity of our course, and of the rectitude of our own humble intentions, we cannot but entertain the cheering hope that the result of that necessity will be regarded with candor and complacency, by that honorable body, against whose powers, as exercised on the point in question, it would seem to militate.

To determine whether the act pleaded in bar of the plaintiff's action in the present case, be constitutional or not, it becomes necessary to ascertain the character of the subject matter to be affected by it, as well as the consequences or effect of the act itself.

When the estate of a deceased person is represented insolvent, Commissioners are to be appointed to receive, examine, and adjust all claims of the creditors to such estate. (1 St. 152.) They are the only board known to our laws, having original cognizance of demands thus situated. Their determination, when approved by the Probate Court, becomes a matter of record. The demand, thenceforth, is a debt of record. (Bray. 41. 1 D. Chip. R. 423, Arthurton Ex'r of Arthurton *v.* Flagg et al. Admr's of Parker, 2 D. Chip. R. 61.) And *is final* between the parties, except in cases where an appeal is taken. (1. St. 153–4.) A judgment not appealed from within the time allowed by law for taking the appeal, is thenceforth of the same effect, as though no appeal were by law allowed, *and is a final judgment.*

Such was the plaintiff's cause of action, upon which the present suit was brought.

By the act in question, the defendant was authorized to enter an appeal from the decision of the Commissioners, to the present session of *this* Court. And it is therby further commanded, that the proceedings, both before the Court of Probate, and *this* Court,

shall be in all respects the same as though the defendant had entered his appeal within the time allowed by law.

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This act, in the first instance, alters the decision of the Commissioners from a final and absolute judgment upon the merits, to a judgment *nisi*, or in other words, to a judgment *liable* to be vacated by the act of the party in entering his appeal: And, secondly, through the authorized act of the party on entering his appeal, it alters it *to* a judgment vacated. That a judgment appealed from *is* a judgment vacated, is evident from the fact that by the appeal, the parties are thrown back upon the original cause of action, and are compelled to litigate anew, that which would otherwise be concluded by the judgment itself. Again, it can never be enforced as a judgment of the same Court whence the the appeal was taken, though the appeal be not carried up. If the appellee do not, on the neglect of the appellant to prosecute his appeal, procure an affirmance by the Court *to* which the appeal was taken, he has lost the benefit of his judgment forever, and must resort to a new suit for his remedy.

We find, then, that the subject matter of this act, was a final judgment of record between party and party, rendered by a board and approved by a Court of competent jurisdiction for that purpose; and that the effect and operation of the act is, virtually to vacate that judgment.

The real question, therefore, is, Have the Legislature power to vacate or annul an existing judgment between party and party?

In solving this question, let us in the first place particularly recur to that palladium of our liberties, by which we are constituted what we are, and without which neither the Legislature nor the Judiciary would have power to command the reverence of the most humble. The doctrine that all powers are originally in the government, and that the people by their charters and their constitutions have abridged and limited those powers, is fit only for those countries where the ignorance of the people is the weapon by which lawless power maintains her throne.

The axiom, that the sovereignty is in the people, is a political truth, on which every free and rational government is founded. Its development has regenerated the nations of this western hemisphere, and again reillumines the long benighted but classic land

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of Greece. When the people associate, and enter into compact for the purpose of establishing government, *that compact*, whatever may be its provisions, or in whatever language it may be written, is the constitution of the State, revocable only by the people, or in the manner they prescribe. It is by this instrument that government is instituted—its departments created, and the powers to be exercised by each, conferred. The powers thus conferred by the written constitutions of this country, must be found *expressed* in the constitution, or be derived by a *just* and *necessary* implication, from the expressions used. But a power which is expressly delegated to *one* department can never be derived to another, by implication, because no necessity for such implication can justly be pretended.

The necessity of a distinct and separate existence of the three great departments of government, was well understood by the people of this State at the time of the adoption of our constitution. Its importance to the security of public liberty and private rights had been proclaimed and enforced by some of the wisest and most eminent men of other countries, and of this, among whom are Montesquieu, Sir William Blackstone, Jefferson and Madison. It had been sanctioned by the people of the United States, by being adopted in terms more or less explicit, into all their written constitutions. Accordingly we find it ordained by our constitution, C. 2, sec. 2, That the supreme Legislative power shall be vested in a House of Representatives, &c.

In C. 2, Sec. 3, That the supreme executive power shall be vested in a Governor, or, in his absence, a Lieutenant Governor and Council.

In C. 2, Sec. 4, That Courts of justice shall be maintained in every County in this State, &c. which Courts shall be open for the trial of all causes proper for their cognizance, &c.

These departments being thus constituted, the constitution, C. 2, Sec. 6, proceeds to declare "That the Legislative, Executive, and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."

Whatever, therefore, it properly belongs to the Judiciary to do, the Legislature are expressly precluded from doing.

That the Legislature have the power, *by general laws*, to es-

tablish the Courts—to appoint and limit their respective jurisdictions—to prescribe the mode in which causes shall be brought before them—to enlarge or restrict the power of granting appeals, reviews, and new trials, and otherwise to regulate their proceedings, so that *every person* find a certain remedy by having recourse to them, for all injuries and wrongs, is readily admitted. But when they have done this, they have exercised every power relating to the administration of justice, "necessary for the *Legislature* of a free and independent State." And this is the extent of the powers of this description, vested in that body by the constitution; except, indeed, certain judicial powers expressly delegated to them touching the conduct and privileges of their own members.

It is true that the constitution has no where particularly defined what those powers are, which properly belong to the Judiciary department. But from the 4th and 6th sections above recited, we learn, that, by the Judiciary department, is meant Courts of justice, which, (it is declared) shall be open for the trial of all causes proper for their cognizance. These powers, then, must be such as are usually exercised by Courts in the trial of causes and the administration of justice; and to ascertain them, we must necessarily resort to the common law and usage, in manifest reference to which, the constitution was framed.

The effect of this act, it has been shown, is, to vacate a judgment, and to direct another trial in the matters determined by that judgment. And it is immaterial whether that effect be produced by authorizing an extraordinary appeal in a case not within, and of course, not "conformably to the laws," or whether it be done by ordering a *new trial* before the same Court. The mischief is the same. It is not by the *mode* of doing a thing, nor by the pretended *capacity* in which it is done, but by the *nature* of the act itself, that its propriety or impropriety is to be determined. To what department, then, do the common law and usages refer us, in view of these proceedings? Most certainly to the Judiciary. The granting of a new trial after verdict and before judgment, (the effect of which is the same upon the former proceedings as that of an appeal) is a part of the ordinary administration of justice in all common law Courts, and is *essential* to the support and proper exercise of the right of trial by Jury.

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Again, the powers of granting appeals, reviews, and new trials, both before and after judgment, have been accorded to the Judiciary department, by the Legislature, from its earliest organization; as is abundantly shown by their numerous statutes providing for and regulating the due exercise of those powers by the several Courts.

These several powers are named together, because, if one is properly a judicial power, the others must be also, inasmuch as they all have the same effect—that of annulling the final character of the anterior proceedings in the cause in which they are exercised.

But why this solicitude to regulate in the best manner the exercise of those powers in the hand of the Judiciary? Is it not because the Legislature have uniformly considered them as powers properly belonging to that department?

But there are other reasons why they are, and must continue to be Judicial powers, independently of this practical expression of the opinion of the Legislature. And

1st.—Some of these powers are *essential*, and others incidentally necessary to the administration of justice.

2dly.—Most of them *have been exercised* from a period long antecedent to our constitution, by all Courts recognizing the common law. And

3dly.—They have been expressly adjudged to be *Judicial*, and not Legislative powers. 3 Dall. 398. 1 N. H. Rep. 204 Jour. Coun. of Cen. of Con. of 1820—21, p. 60.

The position then, that the power in question may be exercised by the Legislature, can be maintained on no other ground, than that *our* constitution, unlike the other free constitutions of this country, has expressly conferred it upon that department. This, is has before been shown, has not been done. But, if it had, then all our general statutes regulating the exercise of these powers by the Judiciary, would be unconstitutional. For, the constitution has expressly forbidden the exercise, by one department, of powers properly belonging to others; and what the constitution has forbidden, no statute of the Legislature can authorize. But, for a doctrine so absurd, it is presumed, no one will contend. And is it not equally true, that, if the exercise of the powers, regulated in the

above mentioned statutes, *by the Judiciary*, is in accordance with the constitution, the exercise of them, or any of them, by the Legislature itself, is not so? No power can be properly a Legislative, and properly a Judicial power, at the same time; and as to mixed powers, the separation of the departments, in the manner prescribed by the constitution, precludes the possibility of their existence.

Nor is the exercise of the power in question less a Judicial act, because, by the existing laws, the Court could not afford the relief prayed for by the party. Supposing that, in regulating the Judiciary department, the Legislature had so fixed the jurisdictions of the several Courts, that a certain class of causes was not cognizable before any of them. Would the powers essential to the trial of those causes, cease to be properly Judicial powers? And would they, for that reason, become properly Legislative powers? Can the Legislature, by thus neglecting its duty in one respect, acquire an extraordinary jurisdiction to the exclusion of a co-ordinate department, in the teeth of the constitution by which they were created? The word "*properly*," used in that instrument, in designating the powers of the sevcral departments, has reference to *that propriety* which had been declared by usage, and which is founded in the nature and fitness of things. To give it any other meaning, would be to place the Legislature in a situation to become the capricious arbiter of its own jurisdiction in all cases whatever.

If a failure in the administration of justice occurs in consequence of the narrowness or paucity of the laws, the wisdom of the Legislature will prevent a recurrence of the evil; but they are not themselves to administer justice without law, because, forsooth, they have not made suitable provision for its administration by that department, to whom its administration is exclusively confided. For, the people in their constitution, have limited themselves to that measure of justice, which can be meted *conformably to the laws*. Beyond this, no remedy for the infraction of a relative right is recognized, in this, or any other free government. The next step is within the confines of tyranny in the government, and its inseparable concomitants, uncertainty and insecurity to the people: No matter by what *names* they may be called, whether democratic or despotic—citizens or subjects. Their relations and conditions will be the same.

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Let us now examine this act, for a moment, independently of these express provisions of the constitution. Is it a law? The essential characteristics of a law, do not consist in form. That which distinguishes a Judicial from a Legislative act, is, that the *one* is a determination of what the existing law is, in relation to a particular thing already done or happened; while the *other* is a predetermination of what the law shall be for the regulation and government of all future cases falling within its provisions. It would seem that this definition alone ought to be deemed conclusive, as to which class of powers the act in question must belong. It does not prescribe a new rule for future cases; but, on the contrary, it virtually repeals the existing law, as to this particular case, and attempts to impose on the Courts a new and arbitrary rule, for their government, in the trial of it. It is not a law, therefore; but a sentence or decree, proclaiming to the world, that the rights of *these* parties shall not remain determined, as they have been, "conformably to the laws;" but that the vested right of the *one*, under that determination, shall be divested, to the end that the *other* may avail himself of a *special privilege* beyond what appertains to the rights of other citizens. This, the Legislature have not power to do. (Fed. No. 81. 6 Cranch 136. 11 Mass. R. 402.) "The very essence of a new law, (says Kent J. in Dash *v.* Van Cleeck, 7 John. R. 502) is a rule for future cases"—meaning, undoubtedly, that it is essential to a new law, that it constitute of itself, a rule for future cases. Law is defined by the British Commentator, to be, "a rule of civil conduct, *prescribed*, &c. (1 Bl. Com. 44.) And again he says, "All laws should be made to commence *in futuro*, and be notified before their commencement; which is implied in the term *prescribed*. (Ib. 46.) The Court would not be understood to say, that *no* statute law can be valid, which relates to a transaction antecedent to its enactment, as, for instance, a statute of pardon—(See Const. C. 2, Sec. 11.) The principle, meant to be laid down, is, that an act not expressly permitted by the constitution, which impairs, or takes away, rights vested under prior existing laws, is unjust, unauthorized, and void. A principle inculcated by numerous elementary writers and jurists of different ages and nations.

It has already been shown, that the report of Commissioners, on which the present action is founded, has all the qualities of

and must be treated as a final judgment. As such, it perfected a contract between the plaintiff and defendant, and rendered it one of the highest and most solemn nature, because witnessed by the highest kind of evidence, viz. by matter of record. (2 Bl. Com. 465. 7 John. Rep. 489.) This act, therefore, must be deemed void, as repugnant to Art. I. Sec. 10 of the Constitution of the United States which declares, that "No State shall pass any *expost facto* law, or law impairing the obligation of contracts." (See 6 Cranch 187. 7 same 161.)

We have before incidenatlly suggested, that this judgment vested a right in the present plaintiff.

He had presented his claim according to law, and had successfully pursued it to the end of the law. A right, therefore, to have and possess that which he had recovered, had accrued to, and vested in him, under the law. Nothing but execution, or what, in such case, is substituted for execution, remained to be done. The act in question is therefore retrospective, virtually vacating the judgment, and divesting the right acquired under it; and is for that reason, void. It is a settled principle of the common law, that a statute shall not have a retrospective operation, so as to take away a vested right. (6 Bac. Abr. 370. 2 Mod. Rep. 310. 4 Burr. 2460.) "Upon principle, (says Story J.) every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." (2 Gall. R. 139. See also 10 Mass. 439. 7 John. R. 477. 2 Cranch 272.)

But independent of the special limitation contained in the constitutions of this, and the United States, reasoning from the general theory and nature of our government, we necessarily arrive at the same conclusion. The government being composed of departments independent of each other, and their powers *separated*, it follows, that each has exclusive cognizance of the matters within its respective jurisdiction, and that when acting within it, the authority of each is, and must be, final and supreme. Mr. Hamilton asserts, in his Commentary on the Constitution of the United States, "That it is not true, that the *Parliament of Great Britian*, or the Legislatures of the particular States, can rectify the exceptionable

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decisions of their respective Courts." Again, he says, "the theory, neither of the British, nor the State Constitutions, authorizes the reversal of a Judicial sentence by a Legislative act." "A Legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." (Fed. No. 81.) The same doctrine is recognized by the Supreme Court of the United States. (2 Dall. 410.) And Judge Swift, in his Treatise on the Laws of Connecticut, (p. 76.) says that no Legislature has a right to interfere in any private controversies between man and man. "The human mind," he says, "cannot imagine a greater absurdity, than to establish Courts of law and equity, to determine all questions of right between man and man, and then to admit the Legislature to exercise a sovereign authority in relieving against their determinations."

We have seen, then, that the act set forth in the defendant's plea in bar, is an assumption of Judicial power—that its exercise by the Legislature is expressly prohibited by the constitution of the State—that it is repugnant to the constitution of the United States—that it is retrospective, defeating in its operation, a right acquired and perfected under the existing laws of the land—and that it is a departure from the spirit and genius of our government. For these reasons it is invalid, and

The defendant's plea in bar is insufficient.

DAVID MCFARLAND *vs.* THOMAS MCLAUGHLIN.

If an action be brought before the County Court on several promissory notes each of which is within the jurisdiction of a Justice of the Peace—yet if the aggregate amount of all the notes exceed his jurisdiction, such *action* is not made cognizable before a Justice of the Peace, and therefore the County Court have jurisdiction of it.

Bennington, July, 1824.

THIS was an action of *assumpsit*, brought originally before the County Court, upon two promissory notes, either of which, was within the jurisdiction of a Justice of the Peace; but both of which exceeded in amount the sum of one hundred dollars.

Plea—*In abatement to the jurisdiction of the Court.*

Bennington, July, 1824.

M'Farland *vs.* M'Laughlin.

And now upon appeal, the cause came on for trial upon the pleadings below.

D. Church for the plaintiff.

Smith for the defendant.

AIKENS J. delivered the opinion of the Court.

A joinder of distinct causes of action, which might be joined at common law, is no where forbidden by our statute. It is the *matter in demand* or *cause of action*, which determines the jurisdiction of a Justice of the Peace, over the *action* or *suit* itself. (St. 15 Nov. 1821, Sec. 1.) It is only from the *action* or *suit* originally made cognizable before a Justice of the Peace, that the jurisdiction of the County Court is taken away. (2 Stat. 101.)

From a recurrence to the matters in demand, which are legally joined in *this suit*, it appears that a Justice of the Peace had not jurisdiction of the *action*. The County Court therefore had jurisdiction of the action. The principle settled in the case Keys *v.* Weed. 1 D. Chip. Rep. 379 governs this case.

Judgment that the action do not abate.

GROVE MOORE *vs.* RUST WILSON.

In an action of account at common law, between merchants, it is unnecessary for the plaintiff to state in his declaration from whose hands the defendant received the moneys for which he is called on to account.

Bennington, July, 1824.

THIS was an action of account at common law, in which Moore the plaintiff declared against Wilson the defendant in a plea, That the said Rust render a reasonable account, for the time in which he was receiver of the money of him the said Grove, from whatever cause and contract coming to the common profit of the said Grove and Rust, whereupon the said Grove saith that he the said Grove and the said Rust, were heretofore, to wit, from the first day of February, 1817, to the first day of December, 1820, partners and merchants in company, and equally and jointly interested and connected in carrying on the business of merchandize ordinarily car-

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ried on at stores denominated country stores, to wit, at Manchester aforesaid, and during the time last aforesaid, the said Rust Wilson as partner as aforesaid, to wit, at Manchester aforesaid, received of and from the profits of the said business, the sum of one thousand five hundred dollars over and above his the said Rust's just share or part of the same, to render a reasonable account of the same to the said Grove, when he the said Rust should be thereto afterwards requested, yet the said Rust, although often requested and demanded, and especially on the 1st day of January, A. D. 1821 at Manchester aforesaid, hath not rendered a reasonable account for the same to the said Grove Moore, but hitherto hath, and still doth refuse so to do, to the damage of the said Grove, as he says, the sum of one thousand five hundred dollars.

To which declaration there was a general demurrer and joinder.

Sheldon and *Isham* for the defendant.

In this action it is necessary to specify from whom the money was received for which the action is brought. 1 Vin. Abr. 151, 175, 176. Co. Lit. 172. Bull. N. P. 127. 1 Com. Dig. 122.

And the reasons are,

1st.—That those allegations in the declaration are material and traversable, and plaintiff cannot declare, in the same declaration, of a receipt from the plaintiff and a receipt from a stranger, for that makes two issues. 1Vin. Abr. 150. 1 Com. Dig. 118.—(*a* 4) 123.—(*e* 5.) 1 Cro. Eliz. 614.

2d.—The party is not obliged to account before the Auditors only for the sums specified in the declaration. 1 Vin. Abr. 175, 176.

In those cases, in that part of the declaration which specified from whom the money was received, judgment to account was rendered; but in that part of the declaration which charged the defendant with moneys received from persons unknown to the defendant, was discharged. As therefore, there is no specification from whom money was received in this declaration, the defendant must be discharged from the whole. Again, if the plaintiff alleges in the declaration one or two individuals from whom money was received, the Court will not order judgment to account for all moneys in the defendant's possession, if it were received from others not mentioned in the declaration, but will render judgment to account only for

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those sums which are specified and made certain. For if under such a declaration the defendant were compelled to account for moneys received from persons not mentioned in the declaration, the Court would not have ordered judgment to account as to part of the declaration, and ordered a discharge as to the residue.

3d.—If the plaintiff could have charged the defendant in this action of account as bailiff, there would have been no necessity of making those allegations, as is necessary in charging him as receiver.

4th.—There can be no distinction in this respect between the case of a common receiver and one who becomes such during a partnership concern; for if the same reason exists in the one that exists in the other, the same principles must apply.

In the action of account brought by one merchant against another, those allegations are as material and traversable as in other cases; and the same principles will arise in this, as in the case of a common receiver. And the defendant is compelled to account before Auditors only for the sums so specified and mentioned in the declaration. In either case, it is believed, that because partners are jointly interested in the moneys for which the action is brought, that that can afford no reason why they are enabled to declare more generally than in other cases; for

1st.—In the action of account brought by a tenant in common against his co-tenant, it is necessary to specify in the declaration from whom the money was received. 1 Vin. Abr. 149.

2dly.—In the action of account brought by Church Wardens, it is necessary to make the same specifications, and so are all the forms and entries. 1 Vin. Abr. 176, 177. Amer. Prec. 130, 131. 11 Mod. Rep. 187, Bishop *v.* Eagle.

In the last case their interest is the same as in the case of partners; and the reason why it is necessary to make those allegations in these cases, apply with equal force to the case of partners. And it is this inconvenience attending the action of account which formed one of the principal reasons why this action has gone almost into disuse, and given ground to the more modern action of *assumpsit*, or to the still more summary method of proceeding by Bill in Equity.

Bennet for the plaintiff.

It is contended by the plaintiff's counsel, that this declaration

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is sufficient, and indeed in the case of partners the only one that can be drawn.

It is admitted that in England, in the cases of *tenants in common* and *joint tenants*, it is necessary in actions charging one as *receiver*, or as *Bailiff and receiver*, to allege by *whose hands* the moneys are received; but its omission there is only cause of special demurrer. In the case of *Bailiffs* it has never been held necessary to state by *whose hands* the goods were received. 1 Coke 172. (*a.*) 7 Bacon 218. Buller N. P. 127.

The reason of this diversity is, that in the former cases where the defendant is charged *as receiver* from the hand of the plaintiff, he is entitled to his *wager of law*, but not where he is charged as receiver from the hands of a *third* person, or as *Bailiff*. 2 Salk. 683. 1 Vin. 178.

The wager of law was allowed on the ground, that the plaintiff's claim was of a *secret* nature, and supposed incapable of better proof. 2 Bacon 218, 219. 12 Mod. 671, 681.

As the wager of law is the ground of the distinction in England, and as that is not known in this State, the same mode of declaring in the case of receivers would be good, as in the case of Bailiffs. "*Cessante causa cessat effectus.*"

The action of account at common law between merchants, in favor of trade, is a distinct class of cases, and it is believed the *wager of law* was never allowed in such cases. Cok. Lit. 172. (*a.*) B. N. P. 127.

No reason can be shown why, in *this State*, the mode of declaring should be, as the defendant's counsel contend for in the case of *receivers*, which may not be urged with equal propriety in the case of Bailiffs. The doctrine contended for would, in the case of merchants, abolish the action of account.

The plaintiff must be confined in his judgment *quod computet* to his allegations and proofs. 1 Vin. 175. (*e.*)

AIKENS J. delivered the opinion of the Court.

The action of account, though of late but rarely used in England, lay at common law, not only against a guardian in socage, bailiff, or receiver, but also in favor of trade between merchants. The relation of partners constitutes a sufficient privity between them, to give them the action.

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Our statute adopting the common law of England, and our act relating to actions of account, recognize and adopt the action, as it existed at common law; and the latter act extends it to some other cases.

Coke says, in his Commentary on Littleton, 172, (*a.*) That if two joint merchants occupy their stock, goods and merchandize, in common, to their common profit, one of them naming himself a merchant, shall have an account against the other naming him a merchant, and *shall charge* him as *receptor denariorum ipsius B. ex quacunque causa et contractu ad communem utilitatem ipsorum A. et B. provenien', sicut per legem mercatoriam rationabiliter monstrare poterit.*

Our statute does not prescribe the *mode* of declaring, and the plaintiff in this case, has governed himself by the directions of Lord Coke.

But it is contended by the defendant, that the plaintiff ought to have specified in his declaration, from whom the money was received, for which the action was brought. And this is his cause for demurrer. Authorities are cited, which show that in England, if one be sued in account as *receiver*, it must be declared by whose hands the money was received. The reason assigned by Buller J. for this rule, is, that if it were received by the hands of the plaintiff, the defendant might wage his law—a reason which does not exist here. But it has not been shown, that in England, the wager of law was ever permitted between joint merchants. And it is believed that the rule is there restricted to the case of common receivers.

The true rule is, that where the *privity* between the parties necessary to support the action at common law, depends upon, or is created by the *receipt* of the money, there it must be stated by whose hands it was received, that the defendant may know whence his liability arises, and be prepared to meet it; but where *that privity* arises from the *connection* or *relationship* of the parties, so that money may be presumed to have been received by the one, for which he is accountable to the other, without the knowledge of such other, by whom it was received, (as in the case of bailiffs and partners) then the allegation is not necessary. It would be unreasonable to require it; but the *relation* which constitutes the

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privity must in the latter case be stated. It *is stated* in the declaration now under consideration.

It would seem that in the case of common receivers, the judgment *quod computet*, should be in pursuance of the verdict, and the accounting restricted to the receipts proved. This would obviously render the action of account nugatory as between partners.

In actions against bailiffs, the party is, in no case, required to state by whose hands the moneys were received. And every reason, on which the rule is founded, exempting them from this necessity, is equally applicable to the case of co-partners. The Court are, therefore, not inclined to depart from the rule, as laid down by Lord Coke; and their judgment is,

That the declaration is sufficient, and that the defendant do account.

BATES *vs.* THOMPSON and BARBER, Administrators of BARBER.

A Justice of the Peace has no authority to render a judgment by confession if he be interested in the demand on which the judgment is rendered—the case coming within the equity of that clause of the 23d section of the act defining the powers of Justices of the Peace, which prohibits a Justice of the Peace from taking cognizance of any cause, where he shall be directly or indirectly interested in the cause or matter to be determined. Such proceeding is therefore *coram non judice*, and the judgment void.

Bennington, July, 1824.

THIS was an appeal from the report of Commissioners, taken before the Judge of Probate.

The plaintiff filed in this Court a declaration on several promissory notes, executed by the intestate, and made payable to one Alson Squire or bearer, and by said Squire indorsed to the plaintiff.

The defendants pleaded in bar several judgments, which were rendered on confession of the intestate, before the present plaintiff, as a Justice of the Peace, on the 11th day of November, 1819, in favor of Alson Squire, the original payee, upon the several notes described in the plaintiff's declaration.

To this plea, the plaintiff replied, That thereafterwards, on the 26th day of January, 1820, the defendants' intestate prayed out

a writ of *audita querela*, returnable to the then next County Court for the County of Bennington, wherein he alleged that the said notes were the sole property of the said Bates at the time he took the said confession and entered the pretended judgments thereon. That the said Bates had no jurisdiction of the matter. That the said intestate had been deceived and defrauded in that respect, and had had no day in Court to object to the same. And being threatened with executions issued on said pretended judgments he prayed relief in the premises: Whereupon, the same being seen and understood by the said County Court, they considered that the said judgments be held for nought, and adjudged that said intestate have and recover, &c.

To this replication there was a demurrer, and joinder in demurrer.

D. Robinson for the plaintiff.

Church for the defendants.

AIKENS J. delivered the opinion of the Court.

By the demurrer all the facts well pleaded in the replication are admitted. From these we learn, that the present plaintiff did as a Justice of the Peace, take the said confessions here pleaded in bar, upon demands which were his own property; for, without this fact having been found, the County Court could not have rendered a judgment in favor of the intestate.

It is true, as has been contended by the defendants in argument, that an *audita querela* is not the proper mode to reverse a judgment. It is also true, that where an execution which has issued *upon a judgment*, is set aside, the judgment may remain. As where an administrator having obtained judgment, after a repeal of his letters of administration, prays out execution; there, the execution at *his* suit, will be set aside on *audita querela*, though the judgment remain. (2 Sand. 148.) But it does not follow, that, where an execution, apparently regular upon the face of it, has issued upon proceedings *coram non judice*, the matters *in pais* which make the proceedings so, cannot be inquired into, upon *audita querela*, with a view to relieve against such executions. Reason and authority show, that, in such case, it is the proper and only remedy.

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(Cro. Eliz. 233, 319, 810. 1 Bac. Abr. 196—7, tit. *Aud Que.* No judgment is thereby reversed; but such facts established as show that none ever existed.

It must be confessed, that the record of the judgment of the County Court is not so technical as could be desired, and possibly it is not entered in such terms as would afford the complainant the specific remedy which his case obviously required, which was, to be relieved from those irregular executions. But, it is not the less evidence of the truth of the material fact alleged in that complaint, to wit, that the Justice who took those confessions was the man in interest. Suppose then, that the fair import of the record is, that the County Court intended to *reverse* those judgments, instead of treating them as never having existed. The question still remains, Did they ever exist? For if they did not a formal reversal could not bring them into existence, or give them any legal effect, which they did not possess before.

They did not exist, that is, there were in the contemplation of law no such judgments, if the Justice had no authority to take them.

In the 23d section of the act defining the powers of Justices of the Peace, (1 St. 178.) it is declared that no Justice of the Peace shall take cognizance of any cause, where he shall be within either the first, second, third or fourth degree of affinity or consanguinity, to either of the parties, or shall be directly or indirectly interested in the cause or matter to be determined.

The reason of this provision is, the possibility that a Justice of the Peace, thus situated, may labor under an influence, which will cause him in the exercise of the duties of his office, to work an injustice to the opposite party.

It is true that the 21st section of the same act, which gives to Justices the power to take confession of debts, &c. does not expressly treat the proceeding as a *cause*, and seems to leave it doubtful whether the duty of the Justice, in such case, is any thing more than a ministerial act; from the exercise of which, it may be said, he is not expressly excluded by the 23d section. But the very next section, (the 22d) speaks of a judgment rendered by a Justice of the Peace, *on confession*, &c. Now it is difficult to conceive, how, in legal proceedings, a Justice can *render a judgment*,

without taking cognizance of a cause, or matter to be determined, by such judgment. Suppose it to be doubtful from the language of the debtor, whether he voluntarily confess the debt or not: The Justice must necesarily judge of the weight of the language used. The declarations of the debtor are, from prudential motives, substituted by the statute, in lieu of the process and the testimony; but they will vary, and the idea of judicial cognizance cannot be excluded.

A record of confession is the same, in effect, as the record of a judgment after the most serious trial. It changes the *nature* of the demand from a simple contract, liable to be avoided in a variety of ways, to a *debt of record*, of which the record itself is plenary proof.

If then, the law regards the purity of justice with such strictness, that it will not permit a magistrate to take jurisdiction of a cause, where he is related to either of the parties in the fourth degree of affinity, for fear of an improper bias, though the judgment is to be rendered publicly in the face of the world, and upon the oath of a disinterested Jury too, if either party request it, with the right of appeal superadded, how much more ought it to deny to a magistrate the power of settling his own disputes, by judging of the legal import of the language of *his* debtor, and of solving by the magic of his own record, made in secret, any doubt he might entertain of the justice of his own demands!

The case of a confession is, therefore, clearly within the equity of the 23d section of the act regulating the powers of Justices of the Peace within this State.

It follows then, that Willard Bates had no authority to take and record the judgments upon confession, which are pleaded in bar. They must be regarded as in the nature of proceedings *coram non judice*, by which no one is estopped. There must therefore be

Judgment for the plaintiff.

Windham, May, 1824.

BRIGGS and MORRIS Administrators of TIMOTHY LOVELL

vs.

FISH et al.

A mortgage deed is nothing more than a pledge of real estate, as security for the payment of a debt. It is an accident of the debt, and liable, at all times, before the equity of redemption is foreclosed, to be defeated by the payment of the debt.

THIS was an action of ejectment for lands in Rockingham. On trial upon the general issue, the plaintiffs gave in evidence a mortgage deed executed by the said Fish to the said Lovell of the lands described in their declaration, dated March 1, 1806, conditioned for the payment of a note of hand of even date, by said Fish to said Lovell, for $1000, payable on or before the 1st day of March, 1816, with interest annually. The defendants admitted they were in the possession of the premises.

Here the plaintiffs rested their case, whereupon it was objected by the counsel for the defendants, and decided by the Court, that inasmuch as the plaintiffs had not produced the note described in the condition of said deed, or otherwise accounted for the same, the plaintiffs were not entitled to recover.

The said note being in the hands of the defendants' counsel in Court, was, at the request of the plaintiffs, produced, and given in evidence by them; upon which the interest was regularly indorsed as paid, to the 1st March, 1809. Then followed this assignment:—"April 17, 1813. Value received, in the sum of six hundred and fifty dollars. I order the contents of the within note to be paid to Jonas Fish.

(Signed) ELIJAH LOVELL, Jr."

The plaintiffs then gave in evidence the deposition of Samuel Hubbard, who testified that in 1812, Timothy Lovell first delivered this note to Elijah Lovell, Jr. as an attorney, to collect the interest then due, and took Elijah's receipt for the same. That some months afterwards, Elijah returned the note to Timothy, saying he could not collect any thing upon it, and took up his own receipt. That at the same time (as the witness believed) in consequence of representations made by Elijah, Timothy requested him again to take this note, and do the best he could with it. On his cross ex-

amination his answer was, that Timothy told him (Elijah) to get it, or do the best he could with it; or words to that effect.

He also testified that another man was present, whom he did not know, but has since understood that his name was Wright.

The deposition of Wright, made in August, 1819, was then introduced by the defendants. This witness testified, that six or seven years ago he was at Timothy Lovell's with Elijah Lovell, Jr. That Timothy delivered a note to Elijah, Jr. which he called the Fish note, and told him to take it and do the best he could with it.

Hugh Henry was also introduced as a witness, who testified, that Elijah Lovell, Jr. offered to sell the note to him, which he declined purchasing. That John Fish was insolvent, and that the property was not worth more than five or six hundred dollars. That Jonas Fish advised with him about purchasing the note, which he advised him not to do; but that Jonas said, if he purchased he could make an arrangement with John, and get the property.

The defendants also gave in evidence a quit-claim deed of the premises from John to Jonas Fish, dated January 11, 1814.

The Court decided that by the law arising upon these facts, the plaintiffs were not entitled to recover; and directed that a nonsuit be entered, with liberty for the plaintiffs to move the Court to set aside the nonsuit, and for a new trial.

To which opinion of the Court, the plaintiffs excepted, and now at this term move the Court accordingly.

AIKENS J. delivered the opinion of the Court.

The mortgage upon which the plaintiffs seek to recover, is nothing else than a pledge of the real estate, as security for the payment of the note. It is an accident of the debt, and liable at all times, before the equity of redemption is foreclosed, to be defeated by the payment of it.

The note secured by that mortgage was, on the 17th of April, 1813, transferred to Jonas Fish, one of the defendants, for the consideration of $650, by Elijah Lovell, Jr.—the maker of the note being at that time insolvent, and the mortgaged premises not worth more than 5 or $600. If this transfer had been made by Timothy Lovell himself, under those circumstances, there could be no doubt, but that his lien upon the land by virtue of the mortgage

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would have followed the debt; for whatever will pass the one will carry the other along with it. The only question, therefore, is, whether Elijah Lovell, Jr. had power and authority from Timothy Lovell to transfer the note in the manner, and for the consideration, which he did.

If such authority was given, it must be the legal inference from the facts in testimony. It is true that the language of Timothy Lovell at the time of the second delivery of this note, was very indefinite, and was such, as if addressed to an attorney, on the ordinary delivery of a note for collection, it would not confer the authority in question. But was this such a delivery? We are of opinion that it was not. But that the language was made use of in view of a sale, and not of a collection. Elijah, the attorney had *had* this note in his hands several months, for the purpose of collecting the interest then due. He, on this very occasion, had returned it to Timothy, uncollected, with the declaration, "that he could not collect anything upon it," and had taken up his receipt. But, as the witness says, in consequence of some representations, made by Elijah, Timothy again delivered him the note with the instructions before mentioned. It is to be supposed that after returning the note with the representation that he could collect nothing, he immediately made a second representation falsifying his first? It is not to be believed.

But the note was not delivered a second time without an object. That object could not have been the collection of interest; for that was declared on the spot to be impracticable. It could not have been to collect the principal; for it was not due. It could not have been to commence a suit upon the mortgage; for the mortgage was not delivered. It must have been then for the purpose of effecting a sale, in the doing which, his instructions were to do the best he could with it. And nothing appears but what he was faithful to those instructions; but on the contrary it does appear, that he sold the note to one of the defendants now in possession for more than it was worth, including the mortgage security.

This conclusion is strengthened by the facts, that soon after the second delivery, Elijah Lovell, Jr. openly and publicly offered the demand for sale, not to the purchaser alone, but to the witness, Henry. That the purchaser took time to advise on the subject.

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That Timothy Lovell lived in the vicinity, and must be presumed to have been cognizant of the facts. We think, therefore, that the conclusion is fair and irresistible, that the note was delivered for the purpose of a sale on the best terms that could be procured; and that it would be monstrous injustice, now to say, that the agent had exceeded the broadest instructions possible, in doing the only act, in view of which, those instructions could have been rationally given.

Judgment that the plaintiffs take nothing by their motion.

Town of Jamaica *vs.* Town of Guilford.

Windham, May, 1824.

If one town support a pauper belonging to another town, the expense incurred for the support of such pauper can in no case be recovered against the town to which such pauper belongs, except by force of some statute regulation—there being no common law right of recovery in such case.

An action of *indebitatus assumpsit* will lie against a corporation.

THIS was an action of *indebitatus assumpsit*. The declaration contained three counts.

1st.—For moneys paid, laid out, and expended.

2d.—For work and labor, care and diligence, and the services of the said town of Jamaica, in the support and maintenance of one Jerusha Cook, a pauper.

3d.—The third count was a special one, setting forth the whole case, and the record, in part, of a judgment in a former suit, respecting the same pauper, in which Guilford had recovered a judgment against Jamaica, and taken out execution, and collected of Jamaica the amount thereof: After which, upon petition of Jamaica, a new trial was granted, in which new trial, a verdict was returned in favor of Jamaica, upon which the Court rendered judgment that Jamaica recover of Guilford their costs, leaving the moneys collected by Guilford of Jamaica, upon the first judgment, in the possession of Guilford.

Issue to the Jury, and verdict for the plaintiff.

On a motion that the verdict be set aside and a new trial granted, founded upon exceptions taken at the trial, the Court,

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on argument, adhered to their opinion, as expressed in their charge to the Jury, and decided,

1st.—That Jamaica is *not* entitled in law, to recover of Guilford, for expenses in keeping and supporting the pauper, after taking her back from the town of Guilford, (which they did do, and supported her from the period of the first judgment above mentioned, till the time of her death ;) because, there is no common law right existing in such case.

2dly.—That Jamaica *is* entitled to recover back the amount of moneys collected on the first judgment, which has since been vacated, together with interest on the same ; and that it may well be recovered in this form of action ; for, where money has been received under such circumstances, that it cannot legally be retained, there being no special promise to repay it, it is no greater fiction for the law to raise a promise by implication, against a corporation, than against an individual.*

Ordered, That the defendant take nothing by the motion for a new trial, and judgment rendered on the verdict.

Overseers of the Poor of Guilford

vs.

Overseers of the Poor of Jamaica.

A writ or process against the Overseers of the Poor of a town, is in effect against such town, and within the provisions of the 24th section of the Judiciary Act, and must be served at least thirty days before the session of the Court to which it is made returnable.

A citation to appear and show cause why a new trial should not be granted, is within the same provision, and is not taken out of the above mentioned statute by the act authorizing the Court to grant new trials.

Windham, May, 1824.

THIS was a petition for a new trial, brought before this Court, by the overseers of the poor of the town of Guilford against the overseers of the poor of the town of Jamaica.

The defendants pleaded in abatement that the citation was not

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* See the case Proctor *vs.* Webber, 1 D. Chip. Rep. 379.

served thirty days before the session of the Court to which it was made returnable.

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T. Phelps for the plaintiffs.

C. Phelps for the defendants.

SKINNER Ch. J. delivered the opinion of the Court.

Two questions are presented in this case for the opinion of the Court. The first arises under the 24th section of the Judiciary Act, from which it is contended by the petitioner, that twelve days only is required for the service of any writ or process, prior to the return, against overseers of the poor. The other arises under the 2d section of the Statute empowering Courts to grant new trials; and it is contended by the petitioner that twelve days notice is sufficient in all cases of petition for new trial. Considering this a writ or process embraced in the 24th section of the Judiciary Act, it is evident the Legislature in limiting the time of service, intended to distinguish the case in which service was to be made upon a person being the party really in interest, from that in which service was to be made upon the person who by reason of his official character is made the representative, agent or trustee of the party in interest, such party being a body politic. And the reason of the law is apparent from the consideration that in the latter case sufficient time must be given for the corporation to be called together to advise and direct, and this as well for the interest of the corporation, as for the security of the agent, and although overseers of the poor are not named, yet it is the duty of the Court to give such construction to the statute as will meet the intention of the Legislature.

The words of the statute, requiring thirty days notice, are, "Every writ or process issued against any county, town, district, society, trustees, proprietors or other community or corporation."

The Court consider this may with propriety be considered process against a corporation, that is, the town of Jamaica, which is virtually the party, and not the overseers of the poor, or if they were, they may very properly be held as trustees of the town, and therefore embraced in the letter of the statute.

Upon the other question, it is material to remark, that unless the statute authorizing the Court to grant new trials, has expressly appointed a shorter period for the service of the citation than

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is limited in the 24th section of the Judiciary Act, there can be no doubt thirty days is required; for the citation must be considered a writ or process, in the language of that section of the statute. The Legislature say the citation shall "be served in the same manner as original writs are by law served, at least twelve days before the sitting of the Court," &c.

If the provision had been, that service should be made *in the same manner*, without adding, *at least twelve days*, there would have been no question but the service must have been thirty days before the session of the Court. For it could not be supposed that the time *when* was not as much included in the expression *manner*, as the *place where*, or the *person upon whom* service was to be made; and if any thing was intended by the after words, *at least twelve days*, &c. it must be understood, that as reference was made to original writs generally, which may not in all cases have required twelve days service before the return, that a shorter period might thereby be excluded.

The process therefore must be dismissed.

STATE'S TREASURER *vs.* PIERCE et al.

The statute authorizing Justices of the Peace to commit or bind over for trial, does not require a return of the original recognizance to be made to the Court before which the accused is bound to appear; but *a return of a copy* is sufficient.

Windham, May, 1824.

THIS was an action of debt on recognizance.

S. Elliot, State's Attorney, for the plaintiff.

Bradley and *Kellogg* for the defendants.

The statement of the case will clearly appear from the opinion of the Court, delivered by,

SKINNER Ch. J. From the declaration it appears that complaint having been made against Loten Pierce, the principal, for the crime of passing counterfeit bank notes, he was duly held before Justice Smith upon a warrant issued on that occasion, and

was by that magistrate, according to the provisions of the statute, bound over to be tried by the Supreme Court, at the then next September term, 1823, at which term, copies of the Justice's records and proceedings, and of the bond of recognizance having been returned, an indictment was by the Grand Jury found and returned against him, who on being duly called, failed to appear, and the bail neglected to produce the principal in Court—that copies of the records and proceedings of the said Justice, and also the bond of recognizance are ready here in Court to be shown.

The special cause of demurrer upon which the defendants rely is, that it does not appear by the declaration that the bond of recognizance is of record in the Supreme Court. The words of the declaration are, "As by true copies of the records and proceedings of the said Benjamin Smith, Esq. Justice of the Peace as aforesaid, at his said Justice Court, holden as aforesaid, for the examination of the said Loten Pierce as aforesaid, and duly attested by the said Benjamin Smith, Esq. Justice of the Peace as aforesaid, and also the bond of recognizance of said Loten Pierce, Ezekiel Pierce, and Ezekiel Pierce, Jr. taken and acknowledged before the said Benjamin Smith, Esq. Justice as aforesaid, now ready in this Hon. Supreme Court to be shown."

From this language it would appear that the original bond of recognizance, that is the *record* thereof made by the Justice, was in this Court, *at the time of declaring*; and if so, the declaration is correct in this particular, admitting the statute required the return of the original. The reference to the record by the *prout patet per recordum* is well made.

It is further insisted in argument, that there is a substantial defect in another part of the declaration, in this, "that it appears that *copies* of the recognizance, taken before the Justice, were returned to the Supreme Court, called out and adjudged forfeit, whereas it should appear that the original recognizance was returned, called out, and adjudged forfeit before suit brought."

By statute, in England, as also in many of the States, the original examination and recognizance are required to be returned. In this State, the Legislature have not authorized the examination of the accused, nor is the magistrate directed in relation to the return. The uniform practice was for many years to return certified copies, and this appears to have been approved by the Court.

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Treasurer *vs.* Pierce.

The statute referred to by the defendant's counsel, directing a *Judge* who takes a recognizance of a person imprisoned for a bailable offence, to return the same, is explicit. But the statute authorizing Justices of the Peace to commit or bind over for trial, does not require any return to be made to the Court before which the accused is to appear. If the practice under the statute had been to send the original into this Court, and to have declared upon it as a record here, it would perhaps have been more correct and convenient. More verity is certainly attached to the original, than to a copy; and the costs of copies would be avoided. But as no decision is stated or known to have been made, opposed to what is believed to have been the practice ever since the statute was passed, the judgment must be that

The declaration is sufficient

STONE *vs.* PROCTOR.

The act fixing the time within which actions must be entered in Justices' Courts, is directory to the Justices. Of the actual time of entry the Justice is necessarily the judge in the first instance. If the party be dissatisfied with his decision, he may plead the matter in abatement, and have the fact found by a Jury; but, if he waive it, and plead to the merits of the action, he is and ought to be bound by his election, and the defendant can never thereafter avail himself of the same matter in abatement, by writ of error or otherwise.

If a barn or farm-yard passes with the farm by a deed of conveyance, and if the grantor convey the manure from the farm and use or dispose of it, the purchaser of the farm may maintain trover against him, and recover the value of the manure.

Windsor, May, 1824.

THIS was a writ of error brought to reverse a judgment rendered by the County Court for the County of Windsor, in an action of trover, originally commenced before a Justice of the Peace. On trial before the Justice, the defendant made a motion to the Court, *ore tenus*, to dismiss the action, for that it was not entered or called within two hours after the time set in the writ for trial. The Justice refused to dismiss the action, whereupon the defendant went to trial upon the merits, and judgment was for the plaintiff—from which the defendant entered an appeal to the County Court.

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The defendant renewed his motion in the County Court to dismiss the action, which was overruled by the Court.

The defendant then pleaded the general issue, and the Jury returned a verdict for the plaintiff, on which judgment was rendered: Upon which the defendant filed the following bill of exceptions which was allowed by the Judges, on which this writ of error was brought.

Before the trial of said action, the defendant filed his motion to dismiss said action, on the ground that the same was not entered in the Justice's Court till more than two hours after the time set in the plaintiff's writ for trial. Reference is had to said petition on file, and the defendant offered to prove that he requested the Justice who tried said action, to make a record of said objection of the defendant to the entry of said action, and certify the same to the Court; but said plaintiff objected to the Court's receiving said motion to dismiss, so as to try its merits, and said Court sanctioned said objection, and refused to receive said motion to dismiss so as to try its merits. And on trial of said action to the Jury, the only evidence the plaintiff adduced to show his title to the manure sued for, was a deed from the defendant to the plaintiff, dated March the 2d, 1822, of the land on which said manure then was, as it originally lay in the barn-yard and in heaps at the stable windows, and it was admitted by the plaintiff that the defendant was to retain possession of said land till the first of April, in said year 1822, and the plaintiff proved that said defendant, before said first of April, to wit, on the 28th and 29th days of said March, carted said manure off from said premises to a distance of forty or fifty rods, and there placed the same in a heap, on the land of a Mr. Tuttle, and that in May following the defendant sold the same. The plaintiff also proved the value of said manure, which is all the testimony adduced by the plaintiff. And the defendant moved the Court to order a nonsuit on the ground that said testimony did not support said action; but said Court refused to order a nonsuit, but suffered said action to proceed. Said defendant then requested said Court to give in charge to said Jury, that said manure, as it lay, when said deed was given, was personal estate, and of course the plaintiff had no right to the same by said deed—also, that if said manure was real estate, and the title passed to the plaintiff by said deed, yet if the

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Jury should find that the defendant severing the same from the freehold, and carrying it away from said premises, and placing the same in said heap, was one continued act, the action of trover would not lie. But said Court refused so to charge said Jury, but did then charge to the contrary on both of said points; and as said matters do not appear of record, &c.

The errors specially assigned are,

1.—That the County Court refused to hear and try the merits of a motion to dismiss the action made by Stone the defendant below, (which motion was predicated on matters *dehors* the record) and also that they refused to dismiss or order a nonsuit in said action, upon said motion.

2.—That said Court refused to charge the Jury that said manure in the situation in which it was, was personal estate, and did not pass by the deed, but on the contrary did charge the Jury that the same was real estate, and did pass by the deed.

3.—That said Court refused to charge the Jury, that if they should find, that the severing of said manure from the freehold, and carrying the same away, was one continued act, trover would not lie for the same, but did charge the Jury that even if they should so find, yet trover would lie.

Plea—*There is no error.*

Hutchinson for the plaintiff in error.

Proctor brought his action of trover before a Justice for forty cart-loads of manure. The plaintiff did not enter his action before the Justice till after two hours from the time prescribed in the writ for its return. Stone objected to the entry of the action. The Justice overruled the objection, and entered the action. The trial proceeded. The plaintiff, Proctor, recovered judgment, and Stone appealed to the County Court. Stone's attorney applied to the Justice for the copies of the case and the appeal, and particularly requested the Justice to transmit with the copies, and as a part thereof, the objection of the defendant to the entry of the action after the two hours had expired. But the copies were made and forwarded by the Justice, wholly omitting that part which related to the objection to the entry of the action.

Stone made his motion in writing to the County Court for a

dismissal of the action, on the ground that the Justice had no jurisdiction of the action through want of a seasonable entry, and offered to prove the non-entry within two hours—the objection made to the entry, and the overruling the objection, and the request made to the Justice to have all this appear in his copies of the appeal, and showed by the copies of the appeal that the defendant had not, in writing, assented to the entry. But said County Court refused to hear the evidence upon, or in any way to try the merits of said motion, but did dismiss the same without trying its merits.

This is *assigned* for error, and we deem it to *be* error. If the fact were as we contend, the Justice had no jurisdiction. The statute is peremptory that the action shall not be entered after two hours, unless by the consent of the defendant, and said consent entered of record. See stat. Vol. 1, p. 185—6.

If the Justice did not enter of record any consent, which he did not in this case, and refused to send up a record of objection, these facts should be proved by parol; and being proved, should prevail.

We rely, as in point, upon 8 John. R. 391, Proudfit *v.* Herman and Henman. Same 409, Low *v.* Rice. 7 Mass. 28. 11 John. 407.

The points on which the other errors are assigned arose upon the motion for non-suit, and in the charge to the Jury, and the Court refusing to charge as requested. These depend

1st.—Upon the question whether the manure as it lay originally in the barn-yard, and in heaps at the barn-windows, was real estate, and passed by the deed of Stone to Proctor, or whether it was personal estate, and might be used by Stone, notwithstanding his deed. And

2dly.—Whether the taking and carrying away of the manure, if all one continued act till it was placed off the premises on other lands, would support an action of trover, or must be trespass. Upon the first of those points, we find but one instance in which the question was ever raised, and in that it was decided to be personal estate. Vin. Abr. Vol. 11, p. 175. Citing Styles 66 Mich. 23d case, Carver *v.* Pierce.

There is one case in which it has been decided in New-York or Massachusetts, that for a tenant to carry manure off of premises

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But if he waive it, and plead to the merits of the action, he is, and ought to be, bound by his election. Nor does such an objection become a part of the record, unless it is presented by a plea, that it may be answered and the issue found. The Justice did right therefore, in not incorporating the objection in his record.

There is no principle in pleadings better settled, than that where a subject matter of abatement has been waived, and a plea put in to the merits of the action—the cause for abatement cannot afterwards be resorted to. No plea in abatement having been filed before the Justice, none could be received before the County Court. And the motion to dismiss, for that cause, can only be regarded as an attempt to avoid a salutary and well settled principle of law.

A motion does not admit of an issue and finding by a Jury. To permit a motion effecting the destruction of the suit to be predicated upon the suggestion of new facts, would be an infringement of the right of trial by Jury. There was no error, then, in the rejection of the motion to dismiss.

As to the second error assigned, in the absence of precedent and settled authorities, it becomes the duty of the Court to resort to principles, and establish such rules as will be most salutary in practice, and best answer the purposes of Justice.

The distinction between real and personal estate, though of the utmost importance, and obvious enough in most cases, is, nevertheless, artificial, and in some instances, difficult in its application. Indeed, the same substance is, at different times, classed with the one or with the other, depending on its local situation, conformation, use, or other accidental qualities.

The dung of domestic animals, which is the species of manure for which this action was brought, is a substance, which may, perhaps, be ranked with either class, without violence to the general rule. In new countries, where the soil is rich and strong, it is of no value; and its accumulation in a yard or about a stable, is regarded as a nuisance by the proprietor. Where the soil is sterile or much worn, it becomes an article of value. But so do many other decayed vegetable substances. Yet, it can hardly be contended, that when the original soil becomes exhausted from long tillage, the vegetable moulds become *pari passu* personal estate, because they acquire a fictitious value, from that circumstance, as a ma-

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nure. The fact that the original substances were severed from the soil before being eaten by the animals, furnishes no argument. When it is voided by the animals, it has done its office, and is returned to the earth whence it came—as much so, as the leaves of the trees which are severed and decomposed by the hand of time. And it is not perceived why the herding of animals, which compels them to drop their manure within a small compass, so as to make it of easier collection than when voided about the fields, should change its character. It is nevertheless worse than useless, except as a *soil*. As such, it is most valuable on the premises where it is made. It is generally needed there. Its cumbersomeness and the wasting nature of its valuable properties, render it of little or no use to transport to a distance. Its analogy to other decomposed vegetables which are unquestionably of the freehold, and pass with it by deed, and the policy of the rule as applicable to rural economy, induce the Court to decide that the manure of animals being in the yard and at the stable-windows in the state in which it usually accumulates, is part and parcel of the freehold, and that, as such, it passes with the freehold, by deed.

It was said in the argument, that there is a case in Stiles, 66, Carver *v.* Pierce, in which it was decided that manure is personal estate. The case has not been produced in Court, and can afford no light on the subject, unless it should appear what the particular situation of the manure was. There is no doubt but that any portion of the freehold becomes *quasi* personal estate, by severance and removal. A load of clay, sand or stone, when in the market, or detached, collected and secured, with a view to some particular use, is, till again attached to the earth by the use intended, personal estate, and, as such, may be the subject of theft or trover.

The third exception is, that said Court refused to charge the Jury, that if they should find that the severing said manure from the freehold, and the carrying the same away, was one continued act, *trover* would not lie for the same; but did charge said Jury, that even if they should so find, yet trover would lie.

On this subject it is only necessary to observe, that the case proved, as stated in the bill of exceptions, did not require that this question should be decided. The request, that the Court should charge the Jury on the hypothetical point, here stated, was imper-

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That when said Willard was taken as bail, he was reputed to be in circumstances of responsibility, but in fact was not able to pay all his debts. That he carried on two farms, which yielded large profits the summer before, and the summer following his being so taken as bail as aforesaid; but in the spring of 1819, he became wholly destitute of property, and swore out of gaol. That Josiah Crooker, one of the plaintiffs, lived about two miles from the office of the defendants, and was Constable of Pomfret during said period while he complains of the defendants' neglect, and was often in the village where the defendants lived, on business, and must probably have seen them often. And there was no proof that the plaintiffs, or either of them, ever made any application to the defendants, or either of them, to commence a *scire facias* against said Willard as bail of said Meriam, or made any new retainer therefor, or that the defendants ever gave the plaintiffs notice of the situation of their case, and requested further instructions other than is herein stated. The plaintiffs also proved that said Willard was received as bail by the Sheriff, on the 17th of July, 1818; and that the Supreme Court, at the September term, 1820, adjudged against the Sheriff, on account of the insufficiency of said Willard, at said last time, when he was received as bail as aforesaid.

It was also in evidence, that after the service of a *scire facias*, which the defendants did cause to be served on the said Willard, on the 21st Dec. 1820, to wit, in February or March following, that the officer and Willard offered to pay to the plaintiffs $50 to be released from their liability to the plaintiffs, and said it would cost that sum to bring and deliver up said Meriam, and that the plaintiffs offered to take $100. The plaintiffs went into the office and talked with said Cushman—the officer not present—and when he came in, said Cushman advised the plaintiffs not to settle with said Willard and the officer.

And said defendants did then and there contend before said Court, that they were not liable for the neglect complained of by the plaintiffs, without a new application from the plaintiffs to bring such *scire facias*. That one of the plaintiffs living so near the defendants, and so often seeing them, must have known about his prospects of collecting his debt by pursuing Willard, and must have known that no *scire facias* was brought against Willard; and

that, from all the foregoing circumstances, and his not causing somebody to commence a *scire facias*, the Jury were well warranted in presuming that he had countermanded the retainer of the defendants, or had requested them not to commence a *scire facias* against said Willard. That the chance of collection was too small to warrant a *scire facias* without express directions from the plaintiffs. That the *scire facias* would probably have no effect, unless it was to compel the delivering up of Meriam, and making cost. That, therefore, the plaintiffs could not have wished such pursuit. And said defendants moved the said Court to direct a nonsuit in said action for want of proof of a new retainer, or new application from the plaintiffs to the defendants to bring *scire facias* against said Willard. But said Court refused so to direct, and did decide that the original retainer bound the defendants to pursue said *scire facias*. And said defendants then and there contended, That it was a proper question of fact for the Jury to determine, from all the foregoing circumstances, whether the plaintiffs did or did not know of, and consent to said delay complained of in said declaration, and control their said demand, and direct what suit or suits should be brought to enforce the collection. But the said Court then and there decided that not to be a legal inference from the circumstances, and refused to leave the same to the Jury.

And said Court did then and there give in charge to said Jury, That the prospect of Meriam's being delivered up in discharge of his said bail, Willard, was too remote for the Jury to consider, either in reference to the claim against Willard upon the *scire facias*, or to the claim against the Sheriff, for taking said Willard as bail as aforesaid. But that, if the Jury believed that the defendants, in the exercise of a sound and fair discretion, thought it not for the interest of the plaintiffs to commence a *scire facias*, a verdict should be returned for the defendants.

To all which decisions said defendants do except, &c.

Marsh and *Williams* for the plaintiffs.

The defendants, as attorneys of the plaintiffs, undertook the collection of a debt in favor of the plaintiffs against Richard Meriam, and issued a writ on book account, which was served January 6th, 1818, returnable to Windsor County Court, March

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term, 1818. Service was made by attaching the body of Meriam, and Charles Willard was taken as bail.

Auditors having been appointed, and having reported, judgment was rendered and execution issued in favor of J. and Z. Crooker against Meriam for $193 70 damages, and $24 47 cost, and 25 ct. for execution, September term, 1819.

Execution having been given to an officer, was returned *non est* December 1, 1819.

Meriam, the original debtor, went into the State of New-York soon after the service of the original writ.

Willard, the bail, at the time of the service of the writ, was insolvent, as stated in the case.

The plaintiffs insist that it was the proper duty of the defendants, as attorneys, to have taken out and prosecuted, within one year from the time of the judgment against Meriam, a writ of *scire facias* against Willard. That this duty they omitted; and that in consequence of this omission, the plaintiffs have lost the opportunity of enforcing the collection of their debt against the officer.

That it was the duty of the defendants, as attorneys, having undertaken the collection of the plaintiffs' debt, to have sued out the *scire facias* in proper season to charge the bail. The plaintiffs rely upon the general understanding and custom of attorneys and clients. That an attorney having undertaken the collection of a debt, and commenced a suit, without farther instructions, does sue out all process necessary to effect this object, unless he be directed to desist, or unless he decline farther attention to his client's business, and give notice accordingly. That such is the general course of business in this State. That the attorney without fresh instructions, and as circumstances occur, pursues the officer or neglect—the receiptor of property attached—the gaol-bond—*scire facias* against bail—enters an appeal; or if his client be appellee, files his complaint for affirmation of judgment. That pursuit by the attorney is his duty in such cases, is also contended on the authority of Dearborn *v.* Dearborn—15 Mass. 316.

The cases cited from the English authorities, in the defence, that a *scire facias* is a new suit, and requires a new warrant of attorney, do not apply to the practice in this country—the mode of appointing attorneys being different from that in Great Britian and N. York.

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The plaintiffs contend that this case furnishes strong grounds for recovery;—from the situation of Meriam, the circumstances under which bail was taken, as in the event of Merriam's not being delivered up on the *scire facias*, the officer would have been liable, and such seems to have been the opinion of one of the defendants in advising J. Crooker not to settle with the officer, as the whole debt could probably be recovered.

The defendants except to the charge that the prospect of Meriam's being delivered up in discharge of his bail, was too remote for the Jury to consider, &c. Meriam was in New-York or Albany. If the *scire facias* had, in the usual course of business, been commenced at March term, 1820, (which was previous to the decision in Reed's case) the officer would have felt no interest in bringing back Meriam, as he did not *then* suppose himself liable; and Willard, who was insolvent, would *never* take any trouble to bring up the principal. But the chances were *hazardous*. It was a dangerous experiment to go into the State of New-York on such an expedition. The contingency of bringing back Meriam was then, truly, too remote to be taken into account.

The defendants insist, that as J. Crooker lived within two or three miles of them, and often saw them, the Jury were to presume he knew of the *facts*, and gave instructions not to pursue. The situation of the case—of the principal—bail, and their circumstances, forbid any such inference: Pursuit was particularly necessary. Such an inference does not agree with the understanding of the defendants, while the *scire facias* was pending, and with the advice given to J. Crooker, one of the plaintiffs, not to settle with the officer. The inference, too, is wholly unwarranted, when we consider the steps pursued, as it would seem, for the express purpose of charging the bail. The suit against Meriam was pursued to final judgment, and the execution given out, as if for the mere purpose of laying the foundation of a *scire facias*, as it was well known that Meriam had absconded and was insolvent—that in this stage the plaintiffs should have directed the defendants to desist is therefore incredible.

Hutchinson and *Cushman*, *pro sese*, contended that the decision of the Court, upon the subject of a new retainer, was incorrect. That the first retainer extended only to the giving out execution

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upon final judgment in the first suit—especially as one of the plaintiffs so resided that he must have been conusant of his whole concerns. 8 John. R. 361, 367, Jackson *v.* Bartlett. 2 Bos. and Pull. 357, Tipping *v.* Johnson. 6 John R. 106, Gonigal *v.* Smith. 1 Salk. R. 89. 2 do. 603. 5 Modern 397. 6 do. 304. 1 do. 402. 3 do. 369—and Lillie's Entries 225, 403, 890. 7 T. R. 337. Roll's Abr. Vol. 1, p. 291. 2 Sho. R. 138. 1 Rol. R. 2 Wash. 203, Stevens *v.* White. 4 Bur. 2060. That the circumstances shown of the reputed sufficiency of Willard, when he was received as bail—his total poverty at the time of judgment, and the proximity of one of the plaintiffs to the defendants, and the notorious poverty of Meriam—the certainty that he must have known whether a *scire facias* was, or was not, brought against Willard; and his total silence upon the subject, are all facts from which the Jury might infer that the plaintiffs were satisfied with the proceedings of the defendants, and consented to the very neglect they now complain of. And whether they *did* consent or *not*, is matter of fact, within the province of the Jury, and not at all a question of law for the Court. The trial proceeds as if the defendants knew all the facts in the original case, and the Crookers were wholly ignorant, whereas they, the defendants, must have received their knowledge from their clients, that is all particular knowledge of facts. The defendants, seeing the plaintiffs often at their office, must be presumed to have received their instructions from time to time.

The charge of the Court is incorrect, upon the subject of the probability of Meriam's being delivered up in discharge of his bail. *That* probability should have had its *full effect* in mitigation of damages, if nothing more. 2 Wills. R. 325, Russell *v.* Palmer. And it seems the plaintiffs viewed *that probability* something by their *offer*. 11 Mass. 188. 2 Mass. 526, Burrel *v.* Lightgow. 12 Mass. 127, Rice et al. *v.* Hawkins.

SKINNER Ch. J. delivered the opinion of the Court.

The plaintiffs claim damages of the defendants for negligence in the discharge of their professional duty as attorneys. It appears from the case that the defendants were by the plaintiffs employed as attorneys to collect a demand against Meriam. A suit was commenced, and service made by attaching the body of Meriam—Wil-

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lard became bail for his appearance—judgment was rendered September term, 1819—execution seasonably issued, and returned *non est inventus*; and that the defendants neglected to issue a *scire facias* against the bill within the year. Evidence was given tending to shew that Meriam absconded from this State to the State of New-York, soon after the service of the writ, having no visible property—has ever since resided at Albany and New-York, poor and destitute. If a party sustains loss by the negligence of his attorney, there can be no doubt the latter is liable in damages, which are to be measured by the amount of the loss sustained, and not by the amount of the claim or demand in collection. If the attorney should neglect to cause the execution to be issued within the thirty days, and thereby property attached should be released or bail discharged, if the debt is not thereby lost, the debtor remaining of sufficient ability to pay, the attorney is not liable for the whole amount. And in analogy to the decisions that have been uniformly made in this State, in the case of Sheriffs, in which the *insolvency* as well as *solvency* of debtors has been considered proper for the Jury to consider in assessing the damages, it would seem the attorney ought not to be subject to the amount of the debt, provided he can shew that the debtor was without property, and to have charged him in execution would have been unavailing. The attorney is only liable for the amount of the loss occasioned by his neglect; and any fact which will tend to reduce the value of the debt below the nominal amount, is proper to be considered by the Jury.

The defendants insisted on the trial that having shewn Meriam's insolvency—the probability of his being delivered up upon the *scire facias*, (he then residing in Albany, and accessible to his bail,) was proper for the Jury to consider in assessing the damages; but the Court decided otherwise, and instructed the Jury that the prospect of the principal's being delivered up in discharge of his bail, was too remote, &c. To this opinion, the defendants except; and upon this point we consider the Court erred, and the verdict must be set aside. Upon inquiry, it is found, that the cases are rare in which the principal, thus circumstanced, is not surrendered. Indeed, it appears that the plaintiffs themselves estimated the value of their debt at something like one half its nominal amount, in their offer to accept $100.

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The doctrine in the cases of Russel *v.* Palmer, in Wilson, and Pitt *v.* Yalden, in Burrow, are opposed to the opinion expressed in this case upon the trial. The *quantum* of damages ought to have been left to the Jury; but from the instruction given by the Court, they considered it their duty, if they returned a verdict for the plaintiffs, to assess the damages to the full amount of the debt. Upon the other point, the Court have no hesitation in saying, that from the established usage and custom in this State, it is the duty of an attorney who undertakes the collection of a debt, (without special instructions) to pursue it through all the stages, as well against the Sheriff and bail, as against the principal, till the object is effected; and that he is justified in not prosecuting (unless expressly directed) in cases where he is influenced by a prudent regard for the interest of the creditor.

New trial granted.

MARSH *vs.* BADCOCK.

A contract made between the indorsor and indorsee of a promisory note, at the time of the indorsement, that the indorsee shall not prosecute the maker of the note within a certain limited time, takes the case out of the law merchant; and if, at the expiration of such time, the indorsee, use due diligence in his pursuit of the maker of the note, and fail of collecting it, the indorsor is liable.

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THIS was an action of *assumpsit* brought by the indorsee of a promissory note against the indorser.

On trial upon the general issue, the defendant's counsel excepted to the opinion of the Court, in excluding certain evidence offered on the part of the defendant. The grounds of the exception will appear from the following case made at the time of the trial:

On the trial of said action, the plaintiff produced the note described in his declaration, indorsed in the month of Sept. 1820, as therein set forth, and proved by witnesses that one Theophilus Cushing had agreed with the plaintiff to let him have some money, and procure for him the said note. That Cushing paid the defendant for said note, and Marsh paid Cushing. That Marsh, the plaintiff, requested the witness to procure the note to be indorsed by

Badcock, the defendant, that he (Cushing) told the defendant that the note was for Marsh, and the defendant requested Cushing to inform Marsh that he had agreed to wait on Porter, the maker of the note, until the first of March, 1821, a year from the date of the note, and requested no cost made on the note till the year expired. And that the defendant indorsed the note blank, and Marsh was informed of the agreement made with Porter and of the defendant's request aforesaid. And it was further proved that Marsh informed Mr. Lyman, his attorney, with whom he left said note for collection, that such was the agreement upon which he received said note. That the defendant, after Porter became insolvent, and on the day of his commitment to prison, was notified for the first time that the note was not paid, and that Porter was going to gaol on the execution issued upon the judgment rendered upon said note, and that the defendant told said Porter, when he came to be committed to gaol on said execution, to go home ; for he, the defendant, was holden to pay the note. That when said Porter swore out of gaol, the said defendant told the plaintiff's attorney that he was not holden to pay said note as indorser, but did assist in trying to prevent Porter's being admitted to the poor debtor's oath after being informed by the plaintiff's attorney that he could not thereby prejudice himself. That the defendant then acknowledged that the plaintiff was to sue the note if it was not paid within the year. The plaintiff further proved, that he obtained a confession of judgment on said note, December 19th 1820, with an agreement that execution should not issue till the 1st of March then next following. That on the 21st day of said March, the plaintiff gave out to the Sheriff an execution upon said judgment, which execution was dated the 5th day of March. That Porter was committed to prison the 4th of April following, and swore out of gaol the 21st of said April.

The defendant then offered to show in his defence, that Porter was in good circumstances, and had sufficient personal estate to enable the plaintiff to enforce the collection of his said demand and execution. That till the 7th of said March, said Porter had a farm worth $400, and a yoke of oxen worth $60, which he then sold, and yet had remaining, for several days afterwards, personal estate, such as cattle, horses, colts, carts, &c. that might have been levied upon to to the full amount of said execution, had it been

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given to an officer. To which evidence the counsel for the plaintiff did object, and the same was excluded by the Court. To which decision, excluding said evidence, the defendant excepted —which exception was allowed.

And now, at the same term, the cause came on to be heard on a motion made by the defendant to set aside the verdict which had been returned for the plaintiff and for a new trial.

Hutchinson in support of the motion.

The defendant contends that he ought to have been admitted to prove in his defence, that Porter, the signer of the note, was good and able to respond, and had personal estate sufficient to enforce the collection, had due diligence been used by the plaintiff in issuing execution, and that all delay of the plaintiff in pursuing the maker of the note before notice to the plaintiff of non-payment, kept the risk upon him, the plaintiff, and he ought not afterwards to shift it off upon the defendant.

Notice of non-payment was as necessary and as much required by law in this case as if the plaintiff had come back without suit.

Nothing excuses the want of notice back. The defendant had full right to presume the debt was paid after March 1st, till he had notice of non-payment. Anth. N. P. 49, Copper *v.* Powell and Willis. Same 68, Miller *v.* Hackley et al. Same 150, Assignees of Myers and Judah *v.* Coleman. Doug. 449. 5 Bur. Rep. 2607. 1 T. R. 107, Tindall et al. *v* Brown. 11 East. 114, Esdail et al. *v.* Sowerby and Meller.

W. Lyman for the plaintiff, contended,

1st.—That the agreement entered into at the time of the sale and transfer of said note, was an independent contract, which should receive a common law construction, and the rules and principles of the *law merchant* have no application to this case. 4 Mass. 414.

2dly.—Notice to an indorsor of a demand, and refusal of payment by the maker, is a personal privilege which the indorsor has a perfect right to waive; and in this case, the indorsor, by annexing the above condition at the time of the sale and transfer of the note, and by his conduct at the time the original debtor was committed to gaol, did waive all right to notice of non-payment. Copp *v.* M'Dougall, 9 Mass. 1. Putnam et al. *v.* Sullivan et al. 4 Mass. 45. Jones *v.* Fales, 4 Mass. 245.

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If an indorser of a bill or note, after it has become due, and not paid by drawer or maker, promise the holder to pay the same, a previous demand on the drawer or maker, and due notice to the indorsor, is to be presumed, and need not be proved. 3 John. 68. 16 John. 152.

If an indorsor of a bill or note, after it bas become due, and not paid by the drawer or maker, promise the holder to pay the same, a previous demand on the drawer or maker, and due notice to the indorsor, is to be presumed, and need not be proved. 3 John. 68. 16 John. 152.

It seems that the defendant, after notice of the refusal of payment on the day of the commitment of the original debtor, and with a full knowledge of all the facts, controlled the demand by ordering the original debtor to go home, and requesting the officer not to commit him to gaol. This it is apprehended is tantamount to a promise to pay the debt.

3dly. -The indorsee was bound to use no more than ordinary diligence in prosecuting the maker of the note, and giving out the execution within thirty days after the first day of March, 1821, to wit, on the 21st, was using that due diligence which the law requires.

AIKENS J. delivered the opinion of the Court.

This case does not fall within the reason, and consequently not within the rules of the law merchant.

The simultaneous agreement between the plaintiff and defendant, as negotiated and proved by Cushing, and the indorsement of the note, were parts and parcels of the same transaction. Justice cannot be done between the original parties to this agreement, without giving such a construction to the whole transaction, as will carry their understanding into effect. The agreement on the part of the plaintiff to delay the collection of the note a year, according to the request of the defendant, and the understanding that if was not paid within that time, he, the plaintiff, was to sue the *maker*, are conditions to an indorsement inconsistent with the rules of the law merchant.

The indorsement, therefore, as between these parties, can be regarded only as evidence of a *guaranty* that if the plaintiff delayed the collection according to the understanding, and then pur-

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sued the *maker* of the note, with ordinary diligence, such as the law presumes the payee would have made use of, he should be able, by such pursuit, to recover his money. Such diligence, it is conceived by the Court, has been used by the plaintiff, and he has failed to recover his debt of the maker. The evidence offered by the defendant, and rejected by the Court, would not have altered the case. The defendant, as guarantor, or surety in that event, is, therefore, liable. Justice having been done by the verdict, the defendant's motion is denied, and

Judgment must be entered on the verdict.

WASHBURN *vs.* TRACY.

In Error.

In an action on the case for negligence, if it appear that the defendant was not in the exercise of ordinary care and diligence, yet, if it appear that the injury complained of would not have happened, but for a want of ordinary care and diligence in the plaintiff, the plaintiff is not entitled to recover.

It is ordinarily the duty of a person on horse-back to yield the travelled path to one who is travelling in a wagon or other vehicle sanctioned by common consent and immemorial usage.

Where evidence is given on the trial of a cause relevant to the issue, and of course proper for the Jury to weigh, if, when properly requested, the Court refuse to charge the Jury on the point, it is error.

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THIS was a writ of error brought by Washburn to reverse a judgment which Tracy had recovered against him at a County Court, holden for the County of Orange, in June, 1824.

The action was originally commenced before a Justice of the Peace, and came to said County Court by appeal; in which Court, Tracy declared against Washburn, in a plea of trespass on the case, for that he the said plaintiff, on the first day of September, 1823, was the owner and possessor of a certain sorrel mare of the value of $100, on which the plaintiff's son was then riding, to wit, on the highway leading from Barre to Montpelier, in the town of Berlin, and the defendant's wagon, drawn by one horse, whereof the said defendant had the sole management, was at the same time pas-

sing along in the same highway. And the plaintiff avers that the defendant then and there so carelessly and negligently managed his said wagon and horse, that the said horse which was then drawing the said defendant's wagon, then and there drew the same with great violence upon and against the plaintiff's mare aforesaid, so that the shaft of the said defendant's wagon was then and there thrust into the side of the plaintiff's said mare, whereby the said mare, through the negligence of the said defendant, was then and there severely wounded, and soon after died of the said wounds.

To this declaration, the defendant in the Court below, pleaded the general issue, and the Jury returned a verdict for the plaintiff, on which judgment was rendered. And thereupon the defendant below filed the following bill of exceptions, on which this writ of error was brought.

After issue joined in this cause, the plaintiff in support of said issue on his part, called Stephen Haskins, who testified, That at the time the horse was injured, he was in the field back of Ayers' house, about 20 rods from the place where the accident happened. That he saw the boy some distance from Ayers' house, riding a moderate trot—saw the defendant coming the other way, driving very fast—saw the boys turn to the right, and saw the defendant's horse strike the horse on which the smallest boy was riding—thought the defendant's horse quickened his step just before he struck the plaintiff's horse, and inclined a little to the left.

Jonathan Ayers was then called by the plaintiff, and testified That he was not present when the accident happened, but that he examined the ground on the same day—saw the blood in the road, and thinks that he saw the track of the defendant's wagon from which it appeared that he kept along the travelled path until he got within about three feet of the boys, then the wagon track turned to the left, but did not go out of the travelled path—thinks that the turn of the track was in consequence of the horse of the defendant striking the plaintiff's horse: it appeared from the track, that when the defendant's horse struck the plaintiff's, that the defendant backed his horse a little, and then drove to his (Ayers') house—said that the road was smooth, and that on the defendant's right there was ten or twelve paces of smooth ground, on which any person could pass with a carriage, or any other way, with perfect safety;

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and that on his left there was a space of about one rod against his horse, and about seven feet at the hind part of his wagon to the bank of the river, thought there was not one horse in ten that could be rode by the defendant's wagon, at the rate he drove, with safety.

Mrs. Ayres was then called, and testified, That she saw the boys pass her house, riding a moderate jog, one on the right and the other on the left. That soon she saw the defendant coming the other way very fast. The boys, as they approached him, turned to the right—the oldest got his horse out of the road—the youngest followed his brother as the defendant approached—witness thought that he would injure the boy or his horse, and called to him to get out of the road, and thought the boy said he could not—saw the defendant's horse strike the youngest boy's horse—witness was in the house at the north window when the injury happened—six or seven rods off.

The plaintiff in further support of said issue, proved by several witnesses that the horse injured was worth $100.

The defendant in support of the issue on his part, called Aaron Strong, who testified, That he was well acquainted with the road where the accident happened, and lives near the spot—that he examined at the right of the def't where the injury happened—that there was ten or twelve paces of level ground perfectly safe and convenient for turning out with horses, and that on his left there was one rod, and that any person with common and ordinary care could pass a carriage where the defendant was when the injury happened, either on the right or left of it with perfect safety—said he saw the horse after he was injured, and that the wound was upon his side—that it had the appearance of being done by the thill of a wagon—that it entered straight into his body—saw both of the boys soon after the injury—one was 16 or 17 years old—the other younger—the next day the plaintiff came to witness' house, where the horse was—told witness that according to the story that the boys told him, the defendant was not in the least to blame—that it was a *fair accident*—witness said the horse was worth about $60.

The defendant in further support of the issue on his part offered to prove by the witness, Strong, that the boys, soon after the accident happened, told him that the defendant was not in the least to blame, and that the injury happened in consequence of the care-

lessness of the youngest boy—that he first turned out on the left, and then turned his horse across the road directly before the defendant's horse—that the defendant held up as soon as he could, and did all in his power to prevent the injury. To the admission of this testimony, the counsel for the plaintiff objected, and it was excluded by the Court.

Mrs Strong was then called by the defendant, and testified, That she saw the plaintiff the next day after the accident happened, and inquired of him what the boys said about it and whether he blamed the defendant—plaintiff said he did not blame the defendant—according to the boys' story he was not in the least to blame. The defendant here read the deposition of Hannah Briggs, in the words following, to wit: "Mr. Tracy said the boys did not blame Col. Washburn at all—that the fault was in the boy in riding across the road—I told him Col. Washburn was a steady man, and I thought it was not done designedly. "By no means," said Mr. Tracy, "it was an accident."

Rufus McIntire was then called by the defendant, and testified, That he was at Capt. Ayers' when the accident happened—that he saw the defendant when he first came in sight—was not driving very fast—saw the boys when they passed the house—noticed the horses—thought the one the youngest boy rode worth $60. The boys were riding about six or eight feet apart on each side of the road, the youngest on the left—saw the horse soon after he was injured—went and examined the ground where it happened—describes it in the same manner that Mr. Amos Strong has—said any person might pass by Washburn, where the injury happened, either on the right or left with perfect safety—said by the track of the wagon the defendant kept the travelled path—said the grass grew close up to the travelled path on the side the boys turned out.

The plaintiff in further support of the issue on his part, called Anson Tracy, who testified, That he was riding the horse at the time he was injured—said that he and his brother were riding moderately along the road, he on the left and his brother on the right—that he saw the defendant coming upon a fast trot—that just beyond Capt. Ayers', met the defendant, who kept the travelled path—that his brother reined to the right—that he reined the same way—that his brother got his horse out of the road—that his horse

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came against his brothers and stopped—said his horse had got his fore feet on the edge of the grass when the defendant's horse struck him—that the defendant held up his horse—backed him some—said the wagon thill entered his body just back of the stirrup-leather—that just before the defendant's horse struck his, he started a little faster, and bore towards him—said they went back to Ayers' house, and from thence to Mr. Strong's, where they left the horse and went home.

The defendant in further support of the issue on his part, called James Van Sicklen, who testified, That a few minutes after the accident, he saw the boys with the horse, and examined the wound—enquired of them how it happened—they both told him they were riding along upon a moderate trot—that they saw the defendant coming upon a trot—the youngest boy said he was on the left side of the road, and his brother on the right—said his brother turned to the right, and he to the left of the travelled path—said he thought he was wrong, that he turned his horse across the road before the defendant's horse, and the thill of the wagon struck his horse—said that the defendant was not in the least to blame—that the accident was occasioned by his own carelessness—both the boys told this story.

Whereupon the counsel for the defendant insisted that upon the said several matters so given in evidence as aforesaid, he was entitled to recover his cost, and requested the Court to charge and direct the Jury as follows, to wit: That if they found the defendant was in the exercise of common and ordinary care and diligence when the accident happened, the plaintiff could not recover. Secondly, That if they find that the boys could have passed the defendant's wagon while moving in the travelled path, as represented by the witnesses, in safety, if they had exercised common and ordinary skill and prudence, the plaintiff cannot recover. Thirdly, That if they found that the boys and defendant were equally careful or equally careless, that the plaintiff cannot recover; for to support this action, the plaintiff must show that he was in the exercise of common and ordinary care and diligence, and that the injury happened in consequence of a want of the same care and diligence on the part of the defendant. Fourthly, that if the Jury found that the defendant kept the travelled path, and that there was suf-

ficient room on either side for the boys to have passed in safety with common and ordinary skill and prudence, the plaintiff cannot recover. Fifthly, That if they found that there was a passage of either eight or ten paces on the left of the defendant's wagon, and eight or ten feet on the right, and that the defendant kept the traveled path, that there was sufficient room for the boys to pass, and that the defendant was not careless in keeping the traveled path, the defendant must recover his cost. But said Court neglected and refused to charge the Jury as requested by the counsel for the defendant, and charged and directed the Jury as follows, to wit: That if the Jury found from the evidence before them that the defendant did not use common care and diligence in the management of his horse and wagon at the time the injury happened, they will find for the plaintiff the value of the mare in question, and interest to this time. If on the other hand the Jury considered that the defendant did use such care and diligence as prudent men in general use in the management of their horses and wagons, at the time aforesaid, the injury is accidental, and they will find for the defendant his cost. With this direction, and no other, the said Court submitted the case to the Jury, who then and there gave their verdict for the plaintiff to recover of the defendant the sum of $72 damages, and his cost taxed and allowed at $49 4.

And now the said Asahel Washburn says, that in the record and process aforesaid and in the rendition of the judgment aforesaid, there is manifest error in this, to wit: That said County Court allowed the objection of the said Tracy to that part of Amos Strong's testimony which was offered to prove that the boys of the plaintiff who were riding the horses when the injury happened, soon after told him, the witness, that the defendant was not in the least to blame—that the injury was occasioned by the carelessness of the youngest boy—that he first turned out on the left side of the road, then turned his horse across the road, directly before the defendant's horse—that the defendant held up his horse as soon as he could, and did all in his power to prevent the injury. That said County Court neglected and refused to charge the Jury as it appears by the bill of exceptions they were requested to do by the counsel for the said defendant.

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Plea—*there is no error.*

Upham for the plaintiff in error.

It is contended that the declarations of the boys, at the time and soon after the accident happened, were proper evidence against the plaintiff. Peake's Ev. 27.

What is said by a man's wife, or any other member of his family, while acting as his agents or servants, may be given in evidence against him. Swift's Ev. 127, Emerson *v.* Blondin. 1 Esp. Cas. 141, Averson *v.* Kinniard. Anth. N. P. 72. Phil. Ev. 74. 3 Burr. 1255.

The boys may be considered as the agents or servants of the plaintiff at the time the injury happened, and their declarations may be given in evidence against him; for they are supposed to know better than any other person, the true circumstances of the case.

The plaintiff has assigned for error the refusal of the County Court to charge the Jury on the law as requested by his counsel. The Court, if requested to deliver their opinion to the Jury on a point of law pertinent to the issue, are bound to do it, and if they refuse, it is a good cause for a bill of exceptions. Bull. N. P. 316. 2 Cranch Rep. 239. 4 Cranch Rep. 71—72. 2 Binney Rep. 234. 6 Binney Rep. 27.

It appears from the bill of exceptions that the County Court were requested to charge the Jury, that in case they found certain facts proved to their satisfaction, the defence relied on was good in law. This they omitted, and submitted the cause to the Jury with this single remark, to wit, "That the defendant was not liable for damages in this case, if he was in the exercise of common care and diligence at the time the injury happened." This was not such a charge as the defendant considered himself entitled to. His request was disregarded by the Court, and the law and the fact submitted to the Jury.

Nutting for the defendant in error.

1.—The evidence offered by the plaintiff in error, to prove what the defendant's boys had said, was properly rejected by the Court.

Evidence of what another person has said can never be admitted, unless that other person be party or witness. The boys were not parties, nor had they, at the time the evidence was offered, been used as witnesses. Phil. Ev. 173.

2.—During the trial, one of the boys was produced as a witness, and the plaintiff in error was permitted to produce the evidence which had before been rejected, and the error, if any, was cured. 13 John. 517.

3.—The charge of the Court contained the whole law upon the subject, and it is no error that the Court did not use the very words prescribed by the defendant's counsel.

SKINNER Ch. J. delivered the opinion of the Court.

Several questions are presented by the bill of exceptions arising out of the charge of the Judge, but in deciding the case, our attention has been confined to the point in relation to the duty of the Court to have charged the Jury upon the law as applicable to a case in which the negligence of the plaintiff or his servant may have caused or contributed to the injury complained of, which from the evidence contained in the record, appears to have been pertinent in the case, and upon which the counsel for the defendant in the Court below, requested the Court to charge. The plaintiff below charges the defendant with negligently and carelessly driving his (defendant's) horse in the highway whereby the plaintiff's horse, upon which the plaintiff's servant was riding, in the same highway, was by the shaft of the wagon, drawn by the defendant's horse, killed. The plaintiff having shown in evidence, facts from which negligence, want of care and diligence of the defendant might be inferred, and the defendant having shown in evidence facts from which the inference of negligence, want of care and diligence in the plaintiff's servant might arise, the charge of the Court was, that if the Jury found from the evidence before them, that the defendant did not use common care and diligence, in the management of his horse and wagon, at the time the injury happened, they would find for the plaintiff the value, &c.—if on the other hand, the Jury considered the defendant did use such care and diligence, as prudent men generally use, they would find for the defendant; and with this direction, and no other, the Court submitted the case; notwithstanding the counsel for the defendant requested the Court to instruct the Jury in the law, arising from the supposed fact of the plaintiff's negligence. The Court would not have erred in refusing, if there had been no evidence tending to show that fact, or if the law arising from the fact would not have aided the defence—in the former

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case the request would have been impertinent:—in the latter the defendant would not have been prejudiced. Although there may be cases in which evidence is given tending to prove a fact, relevant to the issue, and of course proper for the Jury to weigh, and where a verdict would not be set aside, or judgment reversed, for the neglect of the Court to charge upon the point, *not having been requested so to do*, yet there is no doubt, according to the decisions of this Court, and so is the law, that it would be error in the Court below, if in such case, they should refuse on proper request. 2 Cranch 239. 4 *Ib.* 70, 71.

It appears by the charge of the Court, that the attention of the Jury was directed exclusively to the conduct of the defendant at the time the injury happened, and they were instructed to return a verdict for the plaintiff, if they found from the evidence that the defendant did not use common care and diligence, in the management of his horse and wagon. The charge is clearly erroneous. From this charge it would have been the duty of the Jury to have returned a verdict for the plaintiff, if the defendant had not been in the exercise of ordinary care and diligence, although the injury might not have accrued thereby. It was further the duty of the Court to have called the attention of the Jury to the conduct of the plaintiff's servant, and to have instructed them at least, that if, but for the want of ordinary care and diligence in him, the injury would not have happened, it would be their duty to find for the defendant; for the law is, that where the injury arises from the plaintiff's own misconduct, or want of ordinary caution, notwithstanding the defendant's neglect, &c. the plaintiff cannot recover. 11 East. 60. 2 Taun. 314.

It is ordinarily the duty of a person on horse-back, to give the traveled path to one who is traveling in a wagon, or other vehicle, sanctioned by common consent, and immemorial usage.

The bill of exceptions in this case contains much of the testimony given on the trial, and more than was necessary for the purpose of presenting the questions proper to be raised. Whether the weight of testimony is with the plaintiff or defendant, is not for the Court to decide, and the recent practice of burdening the record with the testimony is worse than useless.

The judgment of the Court is reversed.

AN

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OF THE

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1. In an action of account at common law, between merchants, it is unnecessary for the plaintiff to state in his declaration from whose hands the defendant received the moneys for which he is called on to account. *Moore* vs. *Wilson*. 91.

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ASSETS.

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ASSUMPSIT.

1. In an action of Assumpsit by D. *vs.* B., for the duties on certain goods, which B. agreed with D. to transport from St. Johns to New York, agreeably to a letter of instructions, "to receive at St. Johns and forward to New York to R. and J.; to enter in Vt. District to pay the expenses and secure the duties, &c.:"—it was held that, to support the action, the plaintiff must prove the entry of the goods at the custom house, and the delivery of them in New York. *Dodge* vs *Billings*. 26.

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ATTORNEYS.

1. If a party sustain loss by the negligence of his Attorney, in the collection of a debt, the latter is liable in damages, to be measured by the amount of the loss *actually* sustained, and not by the *nominal* amount of the demand in collection. And any fact, which will tend to reduce the value of the debt, below the nominal amount is proper to be considered by the Jury. *Crooker et al.* vs. *Hutchinson et al.* 117.
2. It is the duty of an Attorney who undertakes the collection of a debt, without special instructions, to pursue it through all the stages, as well against the Sheriff and Bail, as against the principal, till the object is effected. *Ib.*
3. But he is justified in not prosecuting, unless specially directed, in cases where he is influenced by a prudent regard to the interest of the creditor. *Ib.*

B.

BAIL.

1. Bail on a writ of error are not in all cases holden for the amount of the judgment if it be affirmed, but by statute are made liable only for the actual damages occasioned by the delay, and for single or double costs, as they may in the discretion of the Court be taxed on the affirmance of the judgment. *Brace* vs. *Squire et al.* 49.

BONDS.

1. If a Sheriff take a bond to indemnify himself against an escape, on admitting a prisoner to the liberties of the prison, in a case not provided for by law, such bond is void. *Lowrey* vs. *Barney and Read.* 11.
2. If an Administrator *de bonis non* neglect to make an inventory of all the estate of the deceased, real and personal, which remained unadministered by the former Administrator, and return the same to the Court of Probate within the time limited by the Court, it is a breach of the condition of his bond. *Probate Court* vs. *Keeler and Wooster.* 16.
3. If such Administrator neglect to settle the account of his administration within the time limited, it is a breach of the condition of the administration bond:—nor will a settlement of the account of his administration, after the commencement of a suit on the administration bond, and after a judgment therein by *nil dicit*, for the penal sum, save the condition, or bar the action on the bond. *Ib.*
4. If a debtor be committed to jail on an execution in favor of the Sheriff of the Connty, he is in the legal custody of the Sheriff and a bond, taken to the Sheriff for the admission of such debtor to the liberties of the prison, is valid, and an action may be main-

tained on such bond in the name of the Sheriff. *Lowrey* vs. *Hine et al.* 59.

C.

CASE.

1. In an action on the case for negligence, if it appear that the defendant was not in the exercise of ordinary care and diligene, yet if it appear that the injury complained of would not have happened, but for a want of ordinary care and diligence in the plaintiff, the plaintiff is not entitled to recover. *Washburn* vs. *Tracy.* 128.
2. It is ordinarily the duty of a person on horseback, to yield the traveled path to one who is traveling in a wagon, or other vehicle, sanctioned by common consent and immemorial usage. *Ib.*

COMMISSIONERS OF CLAIMS.

See Debt, 3.

CONSTITUTIONAL LAW.

1. Held, that the Legislature in passing an act allowing an appeal from the Commissioners of Claims, after the defendant had neglected to appeal within the twenty days allowed by law, exercised a power properly belonging to the Judiciary department, which by the Constitution they are expressly prohibited from exercising. *Bates* vs. *Barber's Admr.* 77.
2. That said act is in the nature of a sentence or decree, rather than a law, being wholly retrospective in its operation, and depriving a party of a vested right—is a violation of the Constitution established by the people as the supreme law of the State, and therefore void. *Ib.*

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1. An action of Indebitatus *Assumpsit* will lie against a Corporation. *Town of Jumaica* vs. *Town of Guilford.* 103.

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DEBT.

1. Claims allowed by commissioners against an estate represented insolvent, are considered as judgment debts, and being such, no plea founded on the merits of the original contract can avail. *Atherton's Ex.* vs. *Admrs. of Parker.* 61.
2. An action of debt for the recovery of such claim is not an action of debt, in "any lending or contract" without specialty; and is not within the limitation of six years. *Ib.*
3. All the real and personal estate of a deceased person, constitutes a fund in the hands of the administrator for the payment of debts,

and are to be by him reduced to cash for that purpose. And every claim against an estate represented insolvent, of every nature, whether by the terms of the contract, it be due *in presenti* or *in futuro*, is considered as due and payable, and is to be allowed against the estate at its value in money. *Ib.*

4. A claim allowed by the commissioners against an estate represented insolvent, is in the nature of a judgment debt: and although the defendant might in this case have vacated the judgment by entering an appeal within the time limited by law, yet as he neglected to do so, it became to all intents, a final judgment, as clearly so as though no appeal therefrom had been allowed by law, and could not be set aside by an act of the Legislature. *Bates* vs. *Admr. of Barber.* 77.

See Bond, 1, 2, 3, 4.

DECLARATION.

1. In an action of debt on recognizance for the prosecution of an appeal from the judgment of a justice of the peace, it is not necessary to set forth in the declaration a transcript of the proceedings before the justice; but it is sufficient to set forth the proceedings with a *taliter processum fuit.* *Chittenden* vs. *Cutlin.* 22.

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E.

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ERROR.

1. A mistake in the assessment of damages, not apparent from the record, whether the cause was tried by the Court or Jury, cannot be assigned for error. *Arthurton et al.* vs. *Durkee.* 20.
2. The judgment of a County Court rendered upon the trial of an issue of fact, by agreement of parties, is conclusive, and the evidence on which the issue was found cannot be re-examined on a writ of error. *Noble* vs. *Admr. of Jewett.* 36.
3. If a writ of error be made returnable, not to the next term of the Supreme Court, one or more terms intervening between the allowance of the writ and the return, it is irregular and void, and cannot be made to operate as a *supersedeas.* *Brace* vs. *Squire et al.* 49.
4. In such case, a second writ of error may be a *supersedeas.* *Ib.*
5. Where evidence is given on the trial of a cause relevant to the issue, and of course proper for the Jury to weigh, if, when properly

requested, the Court refuse to charge the Jury on the point, it is error. *Washburn* vs. *Tracy*. 128.

See Pleadings, 1.

ESCAPE.

1. If a Sheriff admit a prisoner to the liberties of the prison, in a case not provided for by law, he is guilty of an escape. *Lowrey* vs. *Barney et al*. 11.

EVIDENCE.

1. In an action of Assumpsit on the following receipt, "Received of D. Dodge £275 in a Government Bill of Exchange to account for on notes I hold against him:" held, that parol evidence was admissible on the part of the defendant to prove that the amount of the receipt was, by the agreement of the parties at the time the receipt was given, to be accounted for and applied on certain notes which defendant held in favor of one Copp *vs*. Dodge. *Dodge* vs. *Billings*. 26.

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EXECUTORS AND ADMINISTRATORS.

1. The plaintiff and defendant were both heirs at law of the estate of E. C. and the plaintiff was administrator of said estate. The plaintiff delivered to the defendant certain articles of personal property belonging to said estate, valued at a certain sum, for which the defendant gave his receipt, by which he promised to account to the plaintiff for the said property on a settlement of said estate. In an action of *assumpsit* on said receipt—held that the plaintiff to support his action must show by the records of the Court of Probate a settlement of said estate. *Curtis* vs. *Hubbel*. 9.

See Bond, 2, 3.

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EXEMPTION.

1. A cooking stove is not an article of ornament or luxury, but is an article of household furniture, necessary for upholding life, within the meaning of the statute, exempting certain articles of personal property from attachment and execution. *Crocker* vs. *Spencer*. 68.

INDORSER.

See Promissory Note, 1.

J.

JURISDICTION.

1. If an action be brought before the County Court on several promissory notes, each of which is within the jurisdiction of a justice of the peace—yet, if the aggregate amount of all the notes exceed his jurisdiction, such *action* is not made cognizable before

a justice of the peace, and therefore the County Court have jurisdiction of it. *M'Furland* vs. *M'Laughlin*. 90.

2. A justice of the peace has no authority to render a jndgment by confession, if he be interested in the demand on which the judgment is rendered—the case coming within the equity of that clause of the 23d Section of the Act defining the power of justices of the peace, which prohibits a justice of the peace from taking cognizance of any cause, where he shall be directly or indirectly interested in the cause or matter to be determined. Such proceeding is therefore *coram non judice*, and the judgment void. *Admrs. of Bates* vs. *Barber*. 96.

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MORTGAGE.

1. A mortgage deed is nothing more than a pledge of real estate, as security for the payment of a debt. It is an accident of the debt, and liable, at all times, before the equity of redemption is foreclosed, to be defeated by the payment of the debt. *Admrs. of Lovell* vs. *Fish et al.* 100.

N.

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See Case, 1.

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1. A verdict will be set aside on proof that a Juryman, before the hearing of the cause, declared that he could not give a verdict against the party, in whose favor the verdict was given; with proof also, that the party against whom the verdict was given had no knowledge of such declaration until after the trial. *Deming et al* vs. *S. and E. Hurlbut*. 45.

See Service, 2.

P.

PAUPERS.

1. If one town support a pauper belonging to another town, the ex-

pense incurred for the support of such pauper can in no case be recovered against the town to which such pauper belongs, except by force of some statute regulations—there being no common law right of recovery in such case. *Town of Jamaica* vs. *Town of Guilford*. 103.

PLEADINGS.

1. The act fixing the time within which actions must be entered in Justices' Courts, is directory to the Justices. Of the actual time of entry the Justice is necessarily the judge in the first instance. If the party be dissatisfied with his decision, he may plead the matter in abatement, and have the fact found by a Jury; but, if he waive it, and plead to the merits of the action, he is and ought to be bound by his election, and the defendant can never therefore avail himself of the same matter in abatement, by writ of error or otherwise *Stone* vs. *Proctor*. 108.

See Bond, 3.

POSSESSION.

I. To prove the possession of a defendant in an action of ejectment, it is sufficient to prove a third person in actual possession under the defendant; and if it appear on trial that such third person is in possession of the premises, under a contract in writing between him and the defendant, the possession of the defendant is sufficiently proved, and it is unnecessary to produce such written contract. *Hurd* vs. *Tuttle et al*. 43.

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PROMISSORY NOTE.

1. A contract made between the indorsor and indorsee of a promissory note, at the time of the indorsment, that the indorsee shall not prosecute the maker of the note within a certain limited time, takes the case out of the law merchant; and if at the expiration of such time, the indorsee use due diligence in his pursuit of the maker of the note, and fail of collecting it, the indorser is liable. *Marsh* vs. *Badcock*. 124

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QUI TAM.

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1. In an action of debt on a recognizance for the prosecution of an appeal from the judgment of a Justice of the Peace, it is not necessary for the party, claiming the appeal, to become recognized

for the prosecution of the appeal, if sufficient security be given by way of recognizance entered into by others. *Chittenden* vs. *Catlin.* 22.

2. The Statute authorizing Justices of the Peace to commit or bind over for trial, does not require a return of the original recognizance to be made to the Court, before which the accused is bound to appear; but *a return of a copy* is sufficient. *State's Treasurer* vs. *Pierce et al.* 106.

S.

SERVICE

1. A writ or process against the overseers of the poor of a town, is in effect against such town, and within the provisions of the 24th Section of the Judiciary Act, and must be served at least thirty days before the session of the Court to which it is made returnable. *Overseers of the Poor of Guilford* vs. *Overseers of the Poor of Jamaica.* 104.
2. A citation to appear and show cause why a new trial should not be granted, is within the same provision, and is not taken out of the above mentioned Statute by the Act authorizing the Court to grant new trials. *Ib.*

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See Bond, 1, 4.

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See Error, 3, 4.

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1. If two joint creditors commence an action *qui tam* as being the party aggrieved, to recover the penalty given by the Statute against fraudulent conveyances, and pending the action one of the plaintiffs die, the action survives to the surviving plaintiff. *Wright q. t.* vs. *Eldred.* 37.

T.

TROVER.

1. If a barn or farm-yard passes with the farm by a deed of conveyance, and if the grantor convey the manure from the farm and use or dispose of it, the purchaser of the farm may maintain trover against him, and recover the value of the manure. *Stone* vs. *Proctor.* 108.

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V.

VERDICT.

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W.

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1. An alteration in the circumstances of a devisor after the execution of his will, will not in any case amount to a revocation in law. *Sheldon's Exrs.* vs. *Sheldon et al.* 71.
2. If a part of the estate devised be conveyed by the testator, it is a revocation of the will *pro tanto* only. *Ib.*
3. If a devisor convey the whole of the estate devised, it is of necessity a total revocation of the will; and the plain sense of the Statute of this State, respecting wills and testaments is, that there shall be no implied revocations of wills and testaments, except such as result *ex necessitate rei*. *Ib.*

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